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No. 99-____

IN THE

Supreme Court of the United States

October Term, 1999

RENEE LOWERY, *et al.*,

Petitioners,

v.

CIRCUIT CITY STORES, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case was brought and certified as an employment discrimination pattern or practice class action under Title VII and 42 U.S.C. § 1981 seeking systemic injunctive relief as well as back pay and a jury trial to determine compensatory and punitive damages for the individual class members. The Fourth Circuit vacated a judgment based on a unanimous jury verdict finding that respondent had engaged in an intentional pattern or practice of racial discrimination. The questions presented are:

1. Whether a district court has the authority in a civil rights pattern or practice class action found to meet all of the requirements of Federal Rules of Civil Procedure 23(a) and (b)(2) to decertify the class solely on case management grounds applicable only to Rule 23(b)(3) classes.

2. Whether a district court is precluded from granting systemic injunctive relief to remedy a proven pattern or practice of intentional racial discrimination merely because the previously certified class action has been decertified solely for reasons of case management.

LIST OF PARTIES

1. Renee Lowery, Lisa S. Peterson, Shelby McKnight, Gregory Fleming, Nadra Smith, Ponnette Smith, Sheila Smith, Patricia Spencer and Edward Stokes are petitioners in this Court and were plaintiffs in the district court and appellees and cross-appellants in the court of appeals.

2. Sonya Hairston and Dynelle Johnson were plaintiffs in the district court but were not parties in the court of appeals and are not petitioners in this Court.

3. Circuit City Stores, Inc. is the respondent in this Court and was the defendant in the district court and the appellant and cross-appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Renee Lowery, Lisa S. Peterson, Shelby McKnight, Gregory Fleming, Nadra Smith, Ponnette Smith, Sheila Smith, Patricia Spencer and Edward Stokes ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated March 14, 2000.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. A, *infra*, 1a-28a) is reported at 206 F.3d 431. The first opinion of the court of appeals (App. B, *infra*, 29a-73a) is reported at 158 F.3d 742. The district court's June 25, 1997 opinion declining to stay the permanent injunction (App. C, *infra*, 74a-90a) is unreported. The district court's March 12, 1997 opinion denying Circuit City's post-verdict motion for judgment as a matter of law (App. D, *infra*, 91a-107a) is reported at 73 Fair Empl. Prac. Cas. (BNA) 834. The

district court's March 12, 1997 order entering a permanent injunction (App. E, *infra*, 108a-116a) is reported at 73 Fair Empl. Prac. Cas. (BNA) 847. The district court's August 23, 1996 opinion decertifying the class (App. F, *infra*, 117a-124a) is reported at 168 F.R.D. 550. The district court's April 30, 1996 opinion certifying the class action (App. G, *infra*, 125a-147a) is reported at 70 Fair Empl. Prac. Cas. (BNA) 1681.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2000 (App. A., *infra*, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Civil Rights Act of 1991, 42 U.S.C. § 1981a, and 42 U.S.C. § 1981. Pertinent portions of the statutes are reproduced in Appendix H, *infra*, 138a-147a.

STATEMENT OF THE CASE

A. Proceedings in the District Court

On December 2, 1996, at the conclusion of a month-long trial involving 68 witnesses and 1800 exhibits, a unanimous jury found that respondent Circuit City Stores, Inc. ("Circuit City") had engaged in an intentional pattern or practice of racial discrimination with regard to promotions at its corporate headquarters in Richmond, Virginia. The lawsuit leading to this verdict was filed as a class action by the petitioners, nine present or former employees of Circuit City, as representatives of approximately 1800 African Americans who were employed at company headquarters between April

19, 1992 and the trial in December 1996. Petitioners alleged — and ultimately proved — that Circuit City had intentionally erected a "glass ceiling" that prevented African Americans from obtaining promotions to supervisory or management positions in violation of Title VII and 42 U.S.C. § 1981. First Amended Complaint ¶¶ 17-18.

Petitioners sought permanent injunctive relief, back pay, compensatory and punitive damages and an award of attorneys' fees and expenses. They alleged that the members of the class they represented were victims of Circuit City's intentional pattern or practice of racial discrimination with regard to promotions at headquarters. Specifically, petitioners alleged that there was a corporate culture of racial animus toward African Americans in corporate management promulgated, fostered and condoned by a group of white senior managers, particularly Circuit City's Executive Vice President of Human Resources, William Zierden. Petitioners alleged a disparate treatment theory: that Circuit City's all-white management intentionally implemented their racial animus and stereotypical thinking through discriminatory promotion policies and practices that were facilitated by excessively subjective procedures and criteria to deny promotions to qualified African Americans. The results of this discrimination were stark. In Circuit City's 50-year history, no African American had ever held a senior management position (until one was appointed to the Board of Directors two months prior to the trial), and only four African Americans had ever risen to the lower-level rank of manager, despite the claims of Circuit City witnesses that company policy is to train and promote from within. Tr. 1159-60, 1958-59, 3385-94, 3468-70.

On April 30, 1996, the district court granted petitioners' motion to certify the suit as a non-opt out class under Rule 23(b)(2). (App. 125a-137a) The court found that petitioners had satisfied the commonality, typicality, adequacy of representation and numerosity requirements of Rule 23(a) and that certification of an employment discrimination class

action was appropriate under Rule 23(b)(2) even where money damages were requested in addition to classwide injunctive relief. (App. 131a-136a)

Petitioners filed a motion to bifurcate the trial and asked the district court to adopt a two-stage trial plan pursuant to the model set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) and the Manual for Complex Litigation.[1] The district court denied the motion and *sua sponte* decertified the class on the sole ground that "the class action procedure is not the best method of case management." (App. 122a) The district court subsequently made it clear that it "never found that the class fails to satisfy any of the Rule 23 requirements," and that decertification did not alter "the fact that a group of individuals who qualify for class treatment are entitled to class-wide relief." (App. 94a)

The district court said that because of its concerns over efficiency and fairness to Circuit City it had concluded that the class action procedure was not superior to a method of adjudication that the district court had devised. (App. 122a) Under the district court's plan, petitioners would be required to try their cases in a single trial as individual claimants under the shifting burden-of-proof scheme set forth in *McDonnell*

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[1] Under the *Cooper-Teamsters* model, plaintiffs in a pattern or practice discrimination case try the case in two stages. A Stage I "liability" trial is held in which the trier of fact first decides the factual issue of pattern or practice. If a pattern or practice of discrimination is found, Stage II "remedial" proceedings are held. *See* MANUAL FOR COMPLEX LITIGATION THIRD § 33.54 (1995). During those proceedings class members can establish a *prima facie* case of discrimination merely by showing that an alleged individual discriminatee unsuccessfully sought a promotion. The burden of proof then shifts to the employer pursuant to the so-called "*Teamsters* presumption" because "proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made pursuant to that policy." *Teamsters*, 431 U.S. at 362.

Douglas Corp. v. Green, 411 U.S. 792 (1973).[2] However, the district court allowed petitioners to produce evidence at trial that Circuit City engaged in a pattern or practice of racial discrimination with regard to promotions of African Americans at headquarters, and it ruled that if the jury found that Circuit City had engaged in such a pattern or practice the company would be collaterally estopped from denying the existence of such discrimination at subsequent trials in suits the district court envisioned would be filed by individual African American headquarters employees. (App. 123a) The district court also granted petitioners' request to stay the decertification order until the end of the trial because the statute of limitations would run as to some claimants who would not spend the time and money to file individual actions if the jury found against petitioners on the pattern or practice issue. *See* Order Staying the Order to Decertify, Sept. 6, 1996.

At the end of the one-month jury trial, the district court: (1) lifted the stay of its decertification order; (2) submitted a special verdict form to the jury containing 24 questions, the first of which inquired whether the jury found that Circuit City had engaged in a pattern or practice of racial discrimination; and (3) instructed the jury that it should first resolve the pattern or practice question before considering whether any of petitioners' individual claims of discrimination had been established under the *McDonnell*

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[2] Pursuant to the *McDonnell Douglas* model of proof, an individual claimant attempting to prove a Title VII claim of discrimination with circumstantial evidence must first establish a *prima facie* case by showing (1) that she is a member of a protected class; (2) that she applied for the position in question; (3) that she was qualified for the position; and (4) that she was rejected in favor of someone not a member of the protected group under circumstances giving rise to an inference of unlawful discrimination. If the claimant produces sufficient evidence on these points the production burden shifts to the employer to rebut the *prima facie* case by articulating a legitimate, non-discriminatory reason for the adverse employment action. If the employer does so the claimant bears the burden of proving that the employer's articulated reason is a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802-04.

Douglas method of proof. (App. 45a) The district court denied petitioners' request for a jury instruction based on the *Teamsters* presumption, instructing the jury instead that, if they answered the pattern or practice question in the affirmative, they were permitted but not required to infer that individual promotion decisions were affected by the pattern or practice. (App. 46a) The district court found as a matter of law that six of the petitioners had failed to prove their claims under the *McDonnell Douglas* method of proof and sent only the claims of petitioners Renee Lowery, Lisa Peterson and Shelby McKnight to the jury. (App. 45a)

After deliberating two and one-half days, the jury unanimously found that Circuit City "engaged in a pattern or practice of racial discrimination (as related to promotions) against its former and present African American employees at its Richmond, Virginia Headquarters." Special Verdict Form at 1. The jury also found in favor of Renee Lowery and Lisa Peterson on their individual claims. The jury awarded Lowery $12,500 in back pay and compensatory damages, and $225,000 in punitive damages. Peterson was awarded $4,200 in back pay and compensatory damages, and $47,000 in punitive damages. (App. 46a) The jury found against Shelby McKnight. The district court entered judgments in favor of Lowery and Peterson for the compensatory and punitive damages as found by the jury, and *sua sponte* entered a separate judgment in their favor on the pattern or practice finding. (App. 46a)

After a hearing on petitioners' motion for permanent injunction, the district court entered an injunction aimed at eradicating the pattern or practice of discrimination found by the jury. The court ordered Circuit City to develop a revised program for promotions at headquarters based on objective, job-related and racially neutral standards, and to hire a Director of Diversity Management to implement the revised program and to ensure Circuit City's compliance with the terms of the injunction. (App. 110a-115a) In a separate section of the injunction, the court ordered Circuit City to promote Lowery to

the position that she had been denied, or an equivalent position, and to pay her the difference in salary and benefits that she would have received. (App. 109a-110a)[3]

In granting the injunction, the district court explained the need for broad remedial relief: "It is clear to me that Circuit City at its highest level is still in denial about [the pattern or practice verdict]. And it is clear to me that unless the Court does something, that there will never be any even recognition of this, but even more concrete than that, any chance, any effort to change the situation . . . ." Tr. of Feb. 3, 1997, at 28-29. Circuit City moved for a stay of the injunction, which the district court denied in a comprehensive opinion. (App. 74a-90a) The court of appeals then stayed the injunction, except for the provisions specific to Lowery, in a brief order dated July 15, 1997.

The district court granted petitioners' application for attorneys' fees and expenses in the amount of $3,911,504, finding that petitioners "proved not only that Circuit City discriminated against [Lowery and Peterson] individually, but that a pattern or practice of race discrimination is prevalent at Circuit City." Memorandum Opinion dated June 25, 1997, at 13. The district court also noted that "Circuit City mounted a bitter defense, filed motion after motion, and failed to stipulate to even the simplest facts in the case. Even from the most neutral standpoint, it is apparent that Circuit City mounted a 'Stalingrad defense,' resisting plaintiffs at every turn and forcing them to win their 'hard-earned victory from rock to rock and from tree to tree.'" *Id.* at 12.

B. Initial Disposition on Appeal--*Lowery I*

Circuit City appealed to the Fourth Circuit seeking reversal of the adverse judgments in all respects. Petitioners cross-appealed the decertification of the class, the district

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[3] Peterson left Circuit City prior to the trial so the injunction contained no separate provisions for her.

court's dismissal of the claims of six of the petitioners and the verdict against McKnight based on the district court's refusal to instruct the jury in accordance with the *Teamsters* presumption. The court issued its first opinion in this case on September 14, 1998. (App. 29a-73a)("*Lowery I*").

In *Lowery I*, the Fourth Circuit affirmed the district court's decertification of the class, concluding that the district courts have broad discretion to consider "factors other than those listed in Rule 23 in determining whether to certify a class action." (App. 50a-51a) The court rejected petitioners' argument that it should have reviewed the district's court decertification ruling *de novo* and not for abuse of discretion. The court also rejected petitioners' argument that it was not within the district court's authority to graft Rule 23(b)(3)'s "superiority" requirement onto Rule 23(b)(2), which has nothing in its text or purpose to support such a requirement. The court of appeals, while stating that it did "not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes," nevertheless held that "in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." (App. 52a, n.5) The court acknowledged that its decision in this respect conflicted with that of the Fifth Circuit in *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993). (App. 51a)

Although petitioners never argued to either the district court or the court below that they had a pattern or practice "cause of action" (as opposed to a disparate treatment claim based on a pattern or practice of discrimination), the Fourth Circuit found that once the class was decertified the individual petitioners had no cause of action for pattern or practice and could not avail themselves of the *Cooper-Teamsters* method of proof or the *Teamsters* presumption. The court therefore affirmed the district court's dismissal of the claims of six of the petitioners. (App. 64a)

The court of appeals affirmed the jury's verdict in favor of Lowery and Peterson but vacated the punitive damage awards. The court held that such damages were appropriate only to punish and deter "particularly egregious conduct." (App. 67a-68a) The court determined that the evidence was insufficient to demonstrate that Circuit City's conduct was egregious enough to warrant punitive damages and therefore ruled that the district court had erred in submitting the question of punitive damages to the jury. (App. 68a)

The Fourth Circuit also vacated the district court's injunction as an abuse of discretion except for the provisions relating to Lowery. The court of appeals determined that the injunction granted "what amounts to class-wide relief" and that such relief could be granted only in a certified class action. (App. 68a) Finally, the court below vacated the district court's award of attorneys' fees and costs as an abuse of discretion "in light of the low degree of success the Plaintiffs enjoyed," and remanded the case to the district court to redetermine fees and costs. (App. 72a)

C. First Certiorari Petition

On December 14, 1998, petitioners filed a petition for a writ of certiorari seeking review of the *Lowery I* opinion. The petition presented four questions, including: "Whether 42 U.S.C. § 1981 requires proof of conduct more egregious than intentional racial discrimination in order to permit the jury to consider an award of punitive damages, being substantially the same question that the Court granted certiorari to review in *Kolstad v. American Dental Ass'n,* No. 98-208 (Nov. 2, 1998) [527 U.S. 526 (1999)]." On June 24, 1999, this Court granted certiorari, vacated the opinion in *Lowery I* and remanded the case to the Fourth Circuit for further consideration in light of *Kolstad.* 527 U.S. 1031 (1999).

D. Disposition on Remand--*Lowery II*

After full briefing and oral argument, the Fourth Circuit issued its opinion on remand on March 14, 2000. (App. 1a-28a)("*Lowery II*"). The court of appeals left "untouched [its]

resolution of the issues in *Lowery I*" except for the issues of punitive damages and attorneys' fees. (App. 5a) The court rejected petitioners' argument that if it upheld the award of punitive damages to Lowery and Peterson it should revisit the class action issue, find that the district court was in error in decertifying the class and reinstate the injunction. The court of appeals continued to treat the case as one involving only individual discrimination claims of Lowery and Peterson and reviewed petitioners' evidence on punitive damages in that context. The court found that, viewing the evidence in the light most favorable to Lowery and Peterson, it could not say that no reasonable juror could have returned a verdict assessing punitive damages against Circuit City. Therefore, the court of appeals reinstated the jury's punitive damage awards. (App. 26a)

In doing so, the court below held that under *Kolstad*, the plaintiffs had to provide sufficient evidence to permit a reasonable juror to determine, among other things, that Circuit City had not "engaged in good faith efforts to comply with § 1981." (App. 17a) On that question, the court of appeals reviewed nearly all of the evidence that petitioners had offered in support of their pattern or practice allegations, including:

> (1) that two top Circuit City executives [Zierden and Austin Ligon] harbor racial animosity toward African-Americans; (2) that one of these top executives [Zierden] buried two internal reports reflecting a negative attitude on behalf of Circuit City against racial minorities and failed to take any remedial action in response to the negative findings in the reports; (3) that African-American employees feared retaliation by Circuit City for use of the Open Door Policy, the Associate Cool Line, and Coffee Conferences to complain about

> discrimination; and (4) that several African-American employees of Circuit City felt intimidated by Circuit City in response to their complaints to management about racial animus in promotion procedures. Finally, while the fact that Circuit City had a very subjective and unstructured promotional system in place does not alone suggest a secret corporate policy at Circuit City to keep African-Americans in low level positions . . . when this fact is coupled with the fact that the Circuit City executive responsible for the system harbors racial animus towards African Americans, a reasonable juror could infer that the system was implemented in an effort to mask such corporate policy.

(App. 21a-22a)

The court of appeals again remanded the case to the district court for a redetermination of the attorneys' fee award. While adhering to its decision in *Lowery I* that the district court abused its discretion in granting the petitioners nearly $4 million dollars for attorneys' fees and costs, the Fourth Circuit acknowledged that its reinstatement of the punitive damage judgments meant "the Plaintiffs achieved a somewhat higher degree of success in the case than we first determined." (App. 26a)

REASONS FOR GRANTING THE WRIT

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and again in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court emphasized that the federal courts must apply Rule 23 as written, regardless of policy considerations that might lead to "judicial inventiveness" in applying the rule. *Amchem*, 521 U.S. at 620. The courts below violated this principle by applying case management considerations

relevant only to Rule 23(b)(3) class actions to decertify a proper Rule 23(b)(2) civil rights class action. The result of this "judicial inventiveness" is to seriously undermine one of the most effective tools of civil rights law enforcement – the private pattern or practice class action.

In the Civil Rights Act of 1991, Congress expanded the remedies available to victims of employment discrimination by authorizing jury trials to award compensatory and punitive damages, in addition to the existing equitable remedies of injunctive relief and back pay. The decisions below, however, effectively force victims of an intentional pattern or practice of discrimination to choose between their right to seek class-wide injunctive relief and their right to a jury trial to recover damages. The court of appeals' ruling, on the one hand, gives a district court essentially unfettered discretion to decertify or refuse to certify an employment discrimination class action that satisfies all of the requirements of Rule 23(a) and 23(b)(2) whenever the court concludes that the class action procedure is not the superior method for trying the case. Yet at the same time, the Fourth Circuit ruled that such a case management decision irrevocably precludes a district court from exercising its discretion to allow plaintiffs representing a class of similarly situated persons an opportunity to obtain appropriate relief for a defendant's intentional pattern or practice of discrimination. This misguided approach will "force the class representatives into a Catch-22," for if they do not request compensatory and punitive damages as permitted by the 1991 Civil Rights Act, they will be subject to challenge as inadequate class representatives under Rule 23(b)(4), yet if they seek such damages their class will be deemed unmanageable. *Smith v. Texaco, Inc.*, 88 F. Supp. 2d 663, 679 (E.D. Tex. 2000).

The case management issues that led to class decertification here will be present in every pattern or practice class action under the 1991 Civil Rights Act. Thus, the practical effect of the ruling below will be to deprive representative plaintiffs with meritorious pattern or practice

claims of their right to pursue class actions to obtain both systemic injunctive relief and damages in accordance with the *Teamsters* presumption, and will relegate them to individual damage claims under *McDonnell Douglas*, contrary both to the Congressional intent underlying the 1991 Civil Rights Act, and to the text and purpose of Rule 23(b)(2).

The manner in which the courts apply Rule 23 to balance the fundamental rights guaranteed by the civil rights laws with the case management issues identified by the courts below is an important issue that this Court should address. This case is a particularly suitable vehicle in which to do so. The case included the full range of claims for injunctive relief as well as back pay, compensatory and punitive damages. The litigation involved both class certification and decertification decisions and resulted in a jury verdict on all factual issues, including the issue of pattern or practice, with subsequent injunctive relief. All of these matters were fully explored in extensive judicial opinions by both the district and appellate courts. Accordingly, the case provides this Court with a complete legal and factual record on which to resolve the important questions presented.

I. THE DECISION BELOW CONFLICTS WITH *AMCHEM* AND PRESENTS IMPORTANT QUESTIONS CONCERNING THE AVAILABILITY OF CLASS ACTIONS IN PATTERN OR PRACTICE EMPLOYMENT DISCRIMINATION CASES

In *Amchem*, this Court held that, while district courts have broad discretion to decide whether a particular class plaintiff has met the requirements of Rule 23, they "must be mindful that the rule as now composed sets the requirements *they are bound to enforce*." 521 U.S. at 620 (emphasis added). The Court explained, "The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered . . . ." *Id.* The Court therefore rejected an attempt by the district court to

certify a settlement class that did not meet the requirements of Rule 23(b)(3).

This case presents the other side of the coin considered in *Amchem*, in the context of Rule 23(b)(2). *See also, Ortiz*, 527 U.S. 815 (applying *Amchem* principles to class actions under Rule 23(b)(1)). In *Amchem*, the Court rejected an effort by the district court to expand the application of Rule 23 in the name of judicial efficiency to facilitate the strong public policy in favor of settlement of litigation. Here, by contrast, the courts below have *restricted* the application of Rule 23(b)(2) in the name of judicial efficiency but *contrary* to the strong public policies embodied in the civil rights laws.

Rule 23(b)(2) authorizes a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Advisory Committee Notes state that civil rights cases "where a party is charged with discriminating unlawfully against a class" are "[i]llustrative" of the actions within the scope of Rule 23(b)(2). And this Court has noted that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem*, 521 U.S. at 614. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (subsection b(2) builds "on experience mainly, but not exclusively, in the civil rights field").[4] As the

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[4] *See* 5 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 23.43[1][a], at 23-191 (3d ed. 2000) ("Rule 23(b)(2) was promulgated in 1966 essentially as a tool for facilitating civil rights actions."); 5 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 24.01, at 24-7 (3d ed. 1992) ("The widespread utilization of class actions and judicial recognition that invidious discrimination is by its very nature a public, not private, wrong have served to correct the traditional imbalance of the litigation process.") This does not mean that every employment discrimination action alleging a pattern or practice of discrimination is

district court found, and as the jury's finding of Circuit City's pattern or practice of discrimination confirmed, this case was demonstrably an action in which the defendant engaged in unlawful, class-based discrimination and that was therefore appropriate for Rule 23(b)(2) certification.

The court of appeals, however, held that "in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome" (App. 52 a, n.5), even though Rule 23 expressly provides that such factors as manageability, efficiency and superiority are germane only to a 23(b)(3) class action. The Fourth Circuit's ruling in this regard not only contravenes *Amchem*, but is also inconsistent with other circuit court decisions. The court below itself recognized (App. 51a) that its decision was in conflict with *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), in which the Fifth Circuit held that "questions of manageability and judicial economy are also irrelevant to 23(b)(2) class actions." The Third, Sixth, Seventh and Ninth Circuits are also aligned against the court below on this issue. *See Norris v. Frame*, 585 F.2d 1183, 1189 n.18 (3d Cir. 1978) (superiority need not be shown under (b)(2)); *Penland v. Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986) ("The 'superior method' criterion has been held relevant, however, only to class actions sought to be certified under F.R.C.P. 23(b)(3)."); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977) (unmanageability argument rejected as "frivolous" in a (b)(2) case); *Elliot v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) ("Rule 23 makes manageability an issue important only in determining the propriety of certifying

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automatically entitled to certification as a class action. Rather, petitioners contend that where, as in this case, an employment discrimination action satisfies the criteria set forth in Rules 23(a) and 23(b)(2) under the "rigorous analysis" required by *General Telephone. Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982), decertification or refusal to certify a class solely on case management grounds thwarts the important policies underlying Rule 23(b)(2).

an action as a (b)(3), not a (b)(2), class action."), *aff'd on this issue sub nom. Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The court of appeals in this case was clearly embarked on a foray into "judicial inventiveness" that was unauthorized either by Rule 23 or by established precedent. *Amchem*, 521 U.S. at 620.

Equally troublesome are the broader implications of the decision below. It will now be difficult if not impossible in the Fourth Circuit to maintain a class action to secure all of the class-wide and individual relief intended by Congress for victims of employment discrimination. If district courts are free to decertify class actions that meet all of the requirements of Rule 23(a) and (b)(2) on the sole ground that case management problems are present, then every such case can be decertified because the case management problems confronting the district court will arise in every such action. Employers who engage in a pattern or practice of discrimination will then be able to force the victims of such discrimination to prosecute a series of individual claims with no prospect for class-wide injunctive relief.

Class actions play a particularly crucial role in the private enforcement of the civil rights laws. Individual employees may be reluctant to file suit and risk retaliation or disapproval by their employer. The class action provides strength in numbers and helps to counterbalance the greater resources normally available to the corporate employer. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). Employers guilty of illegal discrimination often adopt an isolation strategy by which they attempt to circumscribe each employee's claim and have it considered separately from the claims of other employees and the general employment policies and practices in the company. Only by aggregating their claims can employees afford to take on a large company

and conduct the discovery and trial that is required to prove a pattern or practice of discrimination.[5]

Congress sought to strengthen the rights of employees when it passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The Act, among other things, allows Title VII plaintiffs to recover compensatory and punitive damages and gives them the right to a jury trial on such damages. There is no indication that the 1991 Act was intended to reduce or alter the important role that class actions play in civil rights enforcement. On the contrary, the purpose of the Act was "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination." H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. As this Court recently pointed out, the Act's "major expansion in the relief available" was designed "to further Title VII's 'central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 254-55 (1994) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421(1975)).

The decision below is at odds with the purposes of the 1991 Civil Rights Act. The district court properly certified the class under Rule 23(b)(2) and never changed its view that the case met all the requirements of Rule 23. On the contrary, the court specifically held that it "has never found that the class fails to satisfy any of the Rule 23 requirements." (App. 94a) The district court decertified the class only because of an erroneous view that it had devised a more efficient way to try a pattern or practice employment discrimination case. The court believed that it could achieve the benefits of a class

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[5] That is clearly the case here. As the district court pointed out, "Circuit City mounted a 'Stalingrad defense,' resisting plaintiffs at every turn and forcing them to win their 'hard earned victory from rock to rock and from tree to tree.'" *See* p. 7, *supra*.

action by utilizing the principle of collateral estoppel and by entering class-wide injunctive relief after the jury found that Circuit City had engaged in a pattern or practice of discrimination. (App. 123a).[6]

The Fourth Circuit eviscerated the district court's trial plan when it held that in a non-class action the district court may not grant systemic injunctive relief. In ruling as it did, the Fourth Circuit failed for the second time to take into account the "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination." *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984). In reversing the Fourth Circuit's decision in *Cooper*, this Court explained that in an individual discrimination claim "the inquiry is on the reason for a particular employment decision," while in a class action alleging a pattern or practice of discrimination, at the liability stage of the trial "the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision-making." *Id.* Similarly, in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982), the Court stated, "Conceptually, there is a wide gap between: (a) an individual's claim that he has been denied a promotion on

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[6] That the district court intended to give the class approximately the same benefits as class certification is evident from the court's opinion denying Circuit City's post-trial motion for judgment as a matter of law:

> Decertification merely for case management purposes does not remove the fact that a group of individuals who qualify for class treatment are entitled to class-wide relief.
>
> Therefore, although the case was not tried as a "typical" bifurcated class action discrimination suit, plaintiffs were still entitled to prosecute the class-wide pattern or practice claim of disparate treatment on behalf of other similarly situated individuals who would later be entitled to bring their own individual claims into the justice system. Hence, the pattern or practice question was properly presented to the jury.

(App. 94a-95a)

discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination; and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class action will share common questions of law or fact and the individual's claim will be typical of the class claims."

Here, petitioners did not make "unsupported allegations" about Circuit City's policy of discrimination against African Americans seeking supervisory or managerial positions at corporate headquarters; petitioners *proved* "a pattern of discriminatory decision-making" with regard to promotions to the satisfaction of a unanimous jury, whose factual finding on that contested issue was upheld by both courts below. Yet the Fourth Circuit affirmed the district court's application of the *McDonnell Douglas* standard of proof to individual claims and deprived petitioners of the *Teamsters* presumption to which they were entitled as a result of the jury's pattern or practice finding.

In so doing, the Fourth Circuit literally elevated form over substance by holding that once the "class action" label was removed, for reasons unrelated to Rule 23(b)(2), the case was thereby automatically transformed into an "individual" claim of discrimination in which evidence of a pattern or practice could be used only to establish pretext with respect to such individual claims. By placing the emphasis on the procedural label rather than on the nature of the claims that were alleged and ultimately proved, the lower court had it backwards: the "class action" label does not determine whether a case involves a pattern or practice of discrimination; the allegations and proof of a pattern or practice determine whether a case is an appropriate class action. The jury's finding that Circuit City engaged in an intentional pattern or practice of discrimination confirmed that this case was not an "individual claim" as defined by this Court in *Cooper*.

The Fourth Circuit's decision in this respect also is in direct conflict with the Eleventh Circuit's decision in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (1986). In *Cox*, the district court certified a gender pattern or practice discrimination case under Rule 23(b)(2). After the first judge retired, a second judge decertified the class prior to trial, finding that plaintiffs had failed to satisfy the numerosity and commonality requirements of Rule 23(a). The court then tried 21 individual cases, entering judgment in favor of three plaintiffs and in favor of the employer in the remaining 18 cases. In reversing those decisions, the court of appeals held that the district court had erroneously decertified the class and had applied the wrong standard of proof to the individual cases: "This [*McDonnell Douglas*] standard was incorrect. In a pattern or practice case, if the plaintiff can establish 'that . . . discrimination was the company's standard operating procedure,' . . . the burden shifts to the employer to prove that the plaintiff was not, in fact, the victim of the discrimination." 784 F.2d at 1559.

In the final analysis, the Fourth Circuit's decision leaves both district courts and employment discrimination plaintiffs in an untenable position. District courts are permitted to exercise their discretion to avoid meritorious employment discrimination class actions, but having done so are not permitted to exercise their discretion to fashion other mechanisms for the trial of claims alleging a class-wide pattern or practice of discrimination. Similarly, plaintiffs who are victims of a pattern or practice of discrimination, and who wish to obtain broad injunctive relief, will be forced to bring a class action. Yet to do so they may be required to drop their claims for compensatory and punitive damages, which are authorized by the 1991 Civil Rights Act, lest the class action be judged "inefficient," "unfair" or "unmanageable." If the plaintiffs file a non-class action to preserve their damages claims, however, they will be prohibited from seeking a pattern or practice finding and corresponding systemic injunctive relief. This procedural impediment to enforcement

of the civil rights laws is wholly inconsistent with the Congressional purposes underlying those statutes.

II. THE FOURTH CIRCUIT'S REFUSAL TO PERMIT THE DISTRICT COURT TO ENJOIN A PROVEN PATTERN OR PRACTICE OF DISCRIMINATION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH THE 1991 CIVIL RIGHTS ACT

The jury heard four weeks of evidence and found as a fact that Circuit City engaged in a pattern or practice of intentional racial discrimination with respect to promotions at corporate headquarters. In *Lowery II*, the court of appeals found the same evidence sufficient to sustain an award of punitive damages, including a predicate finding that Circuit City did not make good-faith efforts to comply with federal anti-discrimination laws. Yet the Fourth Circuit held that the district court is powerless to enjoin Circuit City's proven discriminatory policies and procedures, simply because the class had been decertified for case management reasons. The only injunctive remedy left standing by the court of appeals was the order requiring Lowery's promotion. As a result of the Fourth Circuit's decision, Circuit City remains free to implement its discriminatory promotion policies, to the detriment of the hundreds of African Americans who work at the company's headquarters. This holding is fundamentally contrary both to this Court's precedents and to the policies embodied in the Civil Rights Act of 1991.

This Court has made it clear that "[w]here racial discrimination is concerned 'the district court has not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (emphasis added)). And once a violation has been shown, "the scope of a district

court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *United States v. Paradise*, 480 U.S. 149, 183 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). The choice of remedies to redress racial discrimination is a balancing process left to the sound discretion of the trial court. *Id.* at 184. But when fashioning injunctive relief under Title VII, the district court is obligated to grant "the most complete relief possible." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976). In performing its duty, the district court here stated, "It is anathema to me to have to get into somebody else's business. But I don't see any other way to do it" in view of Circuit City's intransigence in maintaining its discriminatory policies and practices. Tr. of Feb. 3, 1997 at 29.

The decertification of the class should have no effect on the scope of the injunctive relief. This Court has held that a district court's equitable powers under Title VII are not limited to make-whole relief for the identified victims of discrimination. Rather, the court may grant systemwide relief where necessary "to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 474 (1986). Such injunctive relief properly benefits all affected employees, not just those who have come forward and proved that they were victims of the discriminatory practices. *Id.* at 471. *See Teamsters*, 431 U.S. at 361 n.47 (district court should "devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom.") Without broad and effective injunctive relief, it will be impossible to fulfill Congress's central statutory purpose of "eradicating discrimination throughout the economy." *Landgraf*, 511 U.S. at 254. Indeed, it clearly thwarts that purpose to leave in place and undisturbed a proven pattern or practice of intentional discrimination at one of the largest employers in Richmond.

The lower court's decision also conflicts with that of the Fifth Circuit in *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981). There, the court rejected the employer's contention that injunctive relief must be narrowly tailored to benefit only the individual plaintiff. The court focused on "the essential nature of Title VII suits" in which the individual plaintiff "takes on the mantel of the sovereign" in order to "eliminate discrimination." 661 F.2d at 373. Concomitantly, the "court trying a Title VII suit bears a special responsibility in the public interest to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position," because whether so named or not, "the suit is perforce a sort of class action for fellow employees similarly situated." *Id.* (quoting *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 310 (5th Cir. 1970)).

Petitioners submit that *Meyer* correctly applies the law and furthers the purposes of Title VII. The court of appeals should have done the same in this case.[7]

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[7] The decision below also is inconsistent with *Evans v. Harnett County Board of Education*, 684 F.2d 304, 306 (4th Cir. 1982), in which a different panel of the Fourth Circuit held that "[a]n injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 12, 2000

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1372

RENEE LOWERY, LISA S. PETERSON,

Plaintiffs-Appellees,

and

SHELBY MCKNIGHT; GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES,

Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,

Defendant-Appellant.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WASHINGTON LEGAL FOUNDATION; EQUAL EMPLOYMENT ADVISORY COUNCIL; NATIONAL RETAIL FEDERATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

No. 97-1470

SHELBY MCKNIGHT; GREGORY FLEMING: RENEE LOWERY; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES; LISA S. PETERSON,

Plaintiffs-Appellants,

and

SONYA HAIRSTON; DYNELLE JOHNSON,

Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellee.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WASHINGTON LEGAL FOUNDATION; EQUAL EMPLOYMENT ADVISORY COUNCIL; NATIONAL RETAIL FEDERATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 97-1917

SHELBY MCKNIGHT; RENEE LOWERY; LISA S. PETERSON,
Plaintiffs-Appellees,
and
GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES,
Plaintiffs,
v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 98-1170

RENEE LOWERY,
Plaintiff-Appellee,
and

SHELBY MCKNIGHT; GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES; LISA S. PETERSON,

Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-95-964)

Argued: December 1, 1999
Decided: March 14, 2000

Before MURNAGHAN and WILKINS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded with instructions by published opinion. Senior Judge Hamilton wrote the opinion, in which Judge Murnaghan and Judge Wilkins joined.

OPINION

HAMILTON, Senior Circuit Judge:

In this employment discrimination case, Renee Lowery (Lowery) and Lisa Peterson (Peterson), among others, alleged that Circuit City intentionally refused to promote them on account of their race, African-American, in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 (a)(1). The jury found in

Lowery and Peterson's favor, awarding Lowery $12,500 in compensatory damages and $225,000 in punitive damages, and awarding Peterson $4,200 in compensatory damages and $47,000 in punitive damages. The district court entered judgments in conformity with the jury's verdict. Circuit City then made a renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) (Rule 50(b)), which the district court denied. Circuit City noted a timely appeal to this court.[1] On appeal, Circuit City argued, *inter alia*, that the district court erred in denying its Rule 50(b) motion with respect to Lowrey and Peterson's prayer for punitive damages.

On appeal, *inter alia*, we upheld the compensatory damage awards with respect to both Lowery and Peterson, but vacated the award of punitive damages in favor of each on the ground that the record contained insufficient evidence "to conclude that Circuit City's conduct toward Lowery and Peterson was so eregious that it was appropriate to submit the issue of punitive damages to the jury." *Lowery v. Circuit City Stores, Inc. (Lowery I)*, 158 F.3d 742, 766 (4th Cir. 1998). The Supreme Court subsequently granted the Plaintiff's petition for writ of certiorari, vacated our judgment, and remanded the case to this court for further consideration in light of *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118 (1999). *See Lowery v. Circuit City Stores, Inc.*, 119 S.Ct. 2388 (1999).

In *Kolstad*, the Court clarified the circumstances under which a jury may consider a request for punitive damages under Title VII. *See Kolstad*, 119 S. Ct. at 2121. In so doing, the Supreme Court rejected the District of Columbia Circuit's holding that elegibility for punitive damages can only be described in terms of an employer's "'egregious' misconduct." *See id.* at 2124.

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[1] Lowery, Peterson, and the other plaintiffs (collectively the Plaintiffs) noted a timely cross appeal raising various issues decided adversely to them.

Our chief substantive task on remand is to revisit the issue of whether the district court erred in denying Circuit City's Rule 50(b) motion for judgment as a matter of law with respect to Lowery and Peterson's prayer for punitive damages, but to do so in light of the legal principles annunciated by the Court in *Kolstad*, 119 S. Ct. at 2118. *See Kotler v. American Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992) ("The general rule is that, when the Supreme Court remands a civil case, the court of appeals should confine its ensuing inquiry to matters coming within the specified scope of the remand."). On this issue, we hold the district court did not err. Thus, we affirm the judgments in favor of Lowery and Peterson with respect to the jury's awarding of punitive damages.

With one exception, *Kolstad* and our disposition on remand of the punitive damages issue leave untouched our resolution of the remaining issues in *Lowery I*. The one exception is the issue of the appropriateness of the district court's general award of attorneys' fees and costs totaling nearly $4 million upon application by the Plaintiffs. Given our disposition on remand in favor of Lowery and Peterson on the punitive damages issues, we slightly modify our instructions to the district court regarding redetermination on remand of its general award of attorneys' fees and costs. For all other issues unrelated to these modified instructions and unrelated to the issue of punitive damages, we reaffirm our holdings and analysis as stated in *Lowery I* without further discussion.

I.

The full panoply of facts involved in and [sic] procedural history of this case are set forth in our now vacated opinion. *See Lowery I*, 158 F.3d at 749-57. Here, we only conclude the facts relevant to the punitive damages issue set forth in the light most favorable to Lowery and Peterson. *See In re Wildwood Litig.*, 52 F.3d 499, 502 (4th Cir. 1995).

Circuit City owns and operates a rapidly growing chain of retail consumer electronic stores that by January 1996 employed 37,000 "associates" nationwide. By November 1996, Circuit City employed 3,500 people at its Richmond, Virginia Headquarters, about 800 of whom were African-Americans. Several hundred other Circuit City employees work for a wholly-owned subsidiary called First North American National Bank (FNANB), which provides consumer credit to Circuit City's customers.

Lowery joined Circuit City in October 1989 as a management recruiter in the Management Recruiting Department in the Human Resources Division. The title "Management Recruiting Department" is a misnomer, because the purpose of the Management Recruiting Department was to recruit employees for non-managerial positions at Circuit City. The title apparently derives from the notion that the department helps managers at Circuit City fill non-managerial positions.

Lowery held both an undergraduate and masters degree in business administration. The manager of the Management Recruiting Department from 1989 until mid-1994, Catharine Madden, consistently gave Lowery high performance reviews. Lowery consistently exceeded her numerical recruiting goals through July 1995, and became Circuit City's most senior and highly paid recruiter. Despite this success, however, Lowery unsuccessfully sought approximately seven promotions in seven years.

In October 1994, Cynthia Turner (Turner) became manager of the Management Recruiting Department, responsible for supervising nine recruiters. Circuit City gave Turner authority to expand the department such that by October 1996, the department had twenty-one recruiter positions. Turner had authority to hire persons to fill budgeted positions in her sole discretion without first consulting her boss, Senior Vice President William Zierden

(Zierden), the head of Circuit City's Human Resources Division from 1984 to 1996.[2] Circuit City allowed Turner the discretion to organize her department in any way she wanted.

Shortly after Turner became manager of the Management Recuiting Department, she decided to create a new position titled Supervisor of Management Recruiting. Turner interviewed everyone in the department for the new position, including Lowery and Paige Bell (Bell), who, along with Lowery, had expressed interest in the position. Bell is white. Ultimately, Turner offered the new position to Bell, who had less seniority than Lowery, less supervisory experience before joining Circuit City than Lowery, and held neither an undergraduate nor a masters degree in business administration. At trial in this case, Circuit City claimed Bell received the promotion because she was more organized than Lowery.

Peterson joined FNANB in February 1993 as an account management representative. In July 1993, she entered

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[2] Zierden believed that large companies were hampered by bureaucracy, including "rigid systems of job descriptions and rigid [qualifications]" for people to fill job openings. (J.A. 2680). In accordance with this belief, Zierden implemented a company-wide system for promotions that bestowed upon promoters the ability to use widely subjective criteria in their decision-making processes. Specificially, the evidence, when viewed in the light most favoriable to Lowery and Peterson, establishes that at all times relevant to this case, Circuit City: (1) had no written procedures indicating how managers and supervisors should go about promoting employees; (2) had no written procedures or practices requiring a review, either by the Human Resources Department or anyone else, of any promotion decision; (3) did not require promoters to post or advertise job openings, but permitted them to announce an opening to a single candidate of the promoter's own choosing without notifying anyone else of the vacancy; and (4) when a job opening was posted, had no requirements about what the posting should contain. Dr. Beatty, an expert in the field of human resources, testified during the trial in this case that the kind of subjective criteria system implemented by Zierden could easily result in discrimination against racial minorities.

FNANB's training program, which rotates associates through different departments every few months. In May 1994, Peterson rotated into an acting assistant supervior position in the Customer Service Mail Department. It appears that Peterson again rotated into that department some time later. When a permanent position as Assistant Supervisor became available in the Customer Service Mail Department, Peterson applied for the position. Until this time, Peterson had consistently received high performance evaluations.

Peterson's supervisor, Jodi Bischoff (Bischoff), rejected Peterson for the promotion in favor of Janet Whalen (Whalen), who is white. According to Peterson, Whalen had less experience than she did because Whalen had only one rotation as an FNANB trainee; Whalen never received supervisory experience in the Customer Service Mail Department; and Whalen had no familiarity with the reports and monitoring expected of an Assistant Supervisor in that department. When offered the promotion, Whalen turned it down. Nevertheless, Circuit City did not then offer the promotion to Peterson, but chose another white employee, Denise Ramos, for the position. According to Peterson, Ramos had no prior customer service experience, no knowledge of the operating functions of FNANB, no background contacting customers, and no knowledge of the company's computer system. Witnesses for Circuit City also admitted that, when Ramos was selected for the position, she was struggling in her current assistant supervisory position in another department and could not keep pace with her duties. Peterson left FNANB soon after she was rejected for the promotion.

At trial, Lowery and Peterson demonstrated racial animus on the part of Circuit City by introducing evidence that certain Circuit City executives had made comments

evincing racially discriminatory attitudes.[3] First, in 1991, when Lowery approached Austin Ligon, Circuit City's Vice President of Corporate Planning, about a position in his department, he suggested that she "could do better someplace else," at a company that was "more receptive to minorities and women." (J.A. 2091). He mentioned that Lowery should go to a company like Pepsi Cola, which "put [minorities] in decision-making roles," (J.A. 2091). Second, in 1993 Zierden told Lowery that he believed that sales decreased in stores with black managers. Third, Zierden advised Larry Jones, an applicant for a position in Circuit City's Human Resources Division, that "the caliber of minorities and blacks who are in the company, in Circuit City, would not meet the standards for a corporate headquarters type job, and in particular this type [of] job." (J.A. 3145). Fourth, Zierden also told Jones there were "few, if any," blacks in decision-making roles at Circuit City and "he didn't see that situation changing anytime soon because . . . those people who would be maybe [sic] eligible to be promoted upward just weren't there." (J.A. 3148). Fifth, Zierden said that blacks who worked in Circuit City's retail stores "had a propensity to steal." (J.A. 3145-46).

Lowery and Peterson also demonstrated racial animus on the part of Circuit City by introducing evidence than Zierden "buried" two internal reports, known as the Booth and Cook Reports, that were critical of Circuit City's promotion policies and diversity results. In December 1990, Zierden instructed Karen Booth, an employee in the Human Resources Division, to perform a study of how well Circuit City managed diversity in its workplace. Booth's January 1991 report noted, among other things, that statistics on Circuit City's store employees showed that "[t]he promotion ratio for male and non-minority [sales] counselors are [sic] significantly higher than those for women and minorities." (J.A. 838). Booth concluded that

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[3] For the purposes of this appeal, the parties treat FNANB as a division of Circuit City rather than a separate legal entity or a separate employer. We do likewise.

"[i]t is my assumption that many female and minority associates look up the ladder and see no one there like themselves. They perceive no upward mobility beyond a certain level and they look for opportunities outside the company." (J.A. 864, 2641). Zierden directed Booth to retrieve all copies of the report that she had given to other managers, and never discussed the report with any other Circuit City executives.

In May 1995, Circuit City retained Sarah Cook, a graduate student in psychology at the University of Virginia, to conduct a survey and prepare a written report on employee job satisfaction at FNANB. Cook worked on the project for approximately seven months and produced a written report in January 1996. Cook's report noted, *inter alia*, employee concerns that one had to belong to certain cliques in order to get promoted, and that minorities felt excluded. Comments by survey respondents included: "I hate to express this but race affects promotions" and "Minorities are constantly overlooked for promotions and will continue to be overlooked until someone takes legal action against FNANB." (J.A. 1106). Cook's report concluded that a sizeable number of associates perceived that minority associates are not treated equal when compared to majority associates. Cook had recommended that Circuit City review its company policies and practices, but noted that the company's response was defensive and dismissive.

Circuit City never distributed the Cook report to its employees, but instead circulated a short memorandum purporting to summarize the survey's results. The memorandum said nothing about Cook's findings and recommendations about promotion procedures. Moreover, Circuit City took no action concerning the complaints about promotions and made no changes in its promotion practices.

The record does contain evidence that Circuit City engaged in efforts to comply with federal anti-discrimination laws. For example, Circuit City requires all of its managers to attend a week-long seminar entitled "Managing Through

People" that instructs them in appropriate supervision. According to Circuit City, managers are warned not to use impermissible selection criteria in hiring and promotions, and are admonished that Circuit City firmly believes all associates and customers should be treated with respect, Circuit City has policies in place to achieve this goal, and Circuit City is an equal opportunity employer which has set policies and standards to comply with all federal and state laws forbidding discrimination.

The record also contains evidence that Circuit City had a company-wide policy entitled "Treating Associates with Respect," which in part embodied Circuit City's alleged commitment not to discriminate against its employees on account of factors made illegal by federal anti-discrimination statutes such as § 1981 and Title VII. The record contains evidence that Circuit City sent out posters reflecting this policy to its retail stores, included the policy in its 1991 employee handbook, and conducted some individual training sessions regarding the policy with employees in 1991 or 1992.

The record also contains evidence that Circuit City's employee handbook described three avenues for employees to express complaints on all topics and bring problems to the company's attention: the Open Door Policy, the Associate Cool Line, and Coffee Conferences. The Open Door Policy encourages non-management employees to discuss any employment complaints or problems with members of management, beginning with an employee's immediate supervisor, moving to that supervisor's supervisor, if the employee did not feel that he or she had yet received a satisfactory response, and ultimately conferring with the President of Circuit City if need be. The Associate Cool Line is a phone line reserved for calls from non-management employees wishing to express concerns regarding problems that cannot be resolved by their immediate supervisor or by others whom they have contacted for help.

The Coffee Conferences are annual meetings held by a member of the Human Resources Department with a group of

non-management employees from the same department or location where those employees could discuss individual or common concerns and offer suggestions for improving the work environment. The member of the Human Resources Department in charge of each Coffee Conference prepares a written report of the topics discussed for review by Circuit City's CEO and others in top management. Finally, the record contains evidence that in some instances, Circuit City investigated employee complaints of discrimination and that some of those investigations led to discipline of the targets of the investigations.

II.

The jury held Circuit City liable for intentionally refusing to promote Lowery and Peterson on account of their race in violation of § 1981 and Title VII and awarded Lowery and Peterson compensatory and punitive damages. The district court entered judgment in conformity with the jury's verdict, and Circuit City renewed its Rule 50(b) motion, which the district court denied. As noted earlier, the chief substantive issue before us is whether the district court erred in denying Circuit City's Rule 50(b) motion for judgment as a matter of law with respect to Lowery and Peterson's prayer for punitive damages. Before directly addressing this issue, it is necessary that we discuss the close relationship between § 1981 and Title VII in regard to the availability of punitive damages under each statute.

A. Availability of Punitive Damages in General With Respect to Causes of Action for Intentional Discrimination Under 42 U.S.C. § 1981 and Title VII.

Section 1981 "affords a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). So does Title VII. *See* 42 U.S.C. § 2000e-2(a)(1); *Johnson*, 421 U.S. at 457-58. Nearly twenty-five years ago, the Supreme Court sanctioned the prosecution of both of these causes of action by the same plaintiff based upon the same

facts. *See Johnson*, 421 U.S. at 459-62; *Stephens v. South Atlantic Canners, Inc.* 848 F.2d 484, 489 (4th Cir. 1988).

A prevailing plaintiff in a cause of action under §1981 is entitled under the common law to punitive damages "under certain circumstances," *Johnson*, 421 U.S. at 460; specifically, "for conduct [by the defendant] exhibiting malice, an evil motive, or recklessness or callous indifference to a federally protected right," *Stephens*, 848 F.2d at 489. This standard comes directly from the Supreme Court's opinion in *Smith v. Wade*, 461 U.S. 30 (1983), in which the Court held that punitive damages are available under the common law in an action under 42 U.S.C. §1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56.

Punitive damages have only been recoverable with respect to an intentional discrimination claim under Title VII since the passage of the Civil Rights Act of 1991, 42 U.S.C. §1981a. Now, a prevailing plaintiff on an intentional discrimination claim under Title VII may recover punitive damages upon demonstration that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [his or her] federally protected rights," 42 U.S.C. §1981a(b)(1), provided the plaintiff cannot recover punitive damages under §1981, *see* 42 U.S.C. §1981a(a)(1).

Notably, in adopting the language embodying the punitive damages standard set forth in §1981a, Congress looked to the Court's decision in *Smith*. *See Kolstad*, 119 S. Ct. at 2124. Furthermore, the legislative history of the Civil Rights Act of 1991 makes clear that Congress intended passage of the Civil Rights Act of 1991 to permit the imposition of punitive damages with respect to an intentional discrimination claim under Title VII "to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. §1981. No higher standard may be imposed." 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991) (Rep

Edwards' Interpretive Memorandum); *see* H.R. Rep. No. 102-40(I), at 64-65, 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03, 612. Thus, any case law construing the punitive damages standards set forth in §1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages standards with respect to a §1981 claim. This fact is significant in the case before us, because given that Lowery and Peterson prevailed under both §1981 and Title VII, the Civil Rights Act of 1991 only allows them to recover punitive damages under §1981. *See* 42 U.S.C. §1981a(a)(1).

B. Kolstad.

We now turn to consider the legal principles set forth by the Supreme Court in *Kolstad*. In *Kolstad*, the Supreme Court carefully examined the language of §1981a in order to elucidate the circumstances under which punitive damages may be awarded with respect to an intentional discrimination claim under Title VII. Initially, the Court flatly rejected the notion that eligibility for punitive damages can only be described in terms of an employer's "egregious misconduct." *See* 119 S. Ct. at 2124. In this regard, the Court stated:

> While egregious misconduct is evidence of the requisite mental state, §1981a does not limit plaintiffs to this form of evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the statute's structure imply an independent role for "egregiousness" in the face of congressional silence.

Id. (internal citations omitted). Additionally, the Supreme Court opined that "§1981a's focus on the employer's state of mind gives some effect to Congress' apparent intent to narrow the class of cases for which punitive awards are available to a subset of those involving intentional discrimination." *Id.*

The Court then turned to an examination of the terms "malice" and "reckless indifference" as found in §1981a(b)(1). Critically, the Court emphasized that these

terms "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad*, 119 S. Ct. at 2124. Relying on how it previously interpreted the terms "malice" and "reckless indifference" in its prior precedent, the Court held that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 2125.

The Supreme Court then gave examples of when intentional discrimination does not give rise to punitive damages liability under this standard:

> In some circumstances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bonafide occupational qualification defense or other statutory exception to liability.

Id.

After explaining the import of the terms "malice" and "reckless indifference," the Court made clear that the inquiry as to whether an employer found liable for intentional discrimination under Title VII is subject to punitive damages liability "does not end with a showing of the requisite 'malice or...reckless indifference' on the part of certain individuals." *Id.* at 2126 (quoting 42 U.S.C. §1981a(b)(1)) (ellipsis in original). Rather, if it cannot be said that a principal of the employer actually engaged in the discriminatory conduct at issue, the plaintiff must offer evidence sufficient to impute liability for punitive damages from the individual who did so engage to the employer. *See id.* at 2126-27.

The Supreme Court then went on to address the proper legal standards for imputing liability to an employer in the

punitive damages context. *See id.* at 2127. Of relevance to the appeal presently before us, the Court held that an employer may be held vicariously liable for a punitive damage award in a Title VII case for the intentionally discriminatory conduct of its employee, where the employee served the employer in a managerial capacity, committed the intentional discrimination at issue while acting in the scope of employment, and the employer did not engage in good-faith efforts to comply with Title VII. *See id* at 2129. The Court specified that in determining whether an employee is in a managerial capacity, a court should review the type of authority that the employer has given to the employee and the amount of discretion that the employee has in what is done and how it is accomplished. *See id.* at 2128. The Court added that the examples provided in the Restatement (Second) of Torts "suggest that an employee must be important but perhaps need not be the employer's top management, officers or directors to be acting in a managerial capacity." *Id.* (internal quotation marks omitted).

C. *Lowery and Peterson.*

Circuit City challenges the district court's refusal to grant its Rule 50(b) motion for a judgment as a matter of law with respect to Lowery and Peterson's prayer for punitive damages in regard to their respective failure to promote claims. We review the district court's ruling *de novo. See Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 661 (4th Cir. 1993). In so doing, we must affirm the district court's ruling unless we conclude, viewing all the evidence in the light most favorable to Lowery and Peterson, and giving them the benefit of all reasonable inferences, that no reasonable juror could have returned the challenged verdict assessing punitive damages against Circuit City. *See id.* at 660-61.

In determining whether, taking all the evidence in favor of Lowery and Peterson and giving them the benefit of all reasonable inferences, a reasonable juror could have found Circuit City liable for punitive damages. *Kolstad* teaches that we must answer a series of questions with respect to each

plaintiff. We must first ask whether the record contains sufficient evidence for a reasonable juror to find that in intentionally refusing to promote the plaintiff to the position at issue, the decision maker did so in the face of a perceived risk that her decision would violate federal law. *See Kolstad*, 119 S. Ct. at 2125. If the answer is no, we should vacate the portion of the judgment awarding the plaintiff punitive damages and direct entry of judgment as a matter of law in favor of Circuit City on that issue. If the answer is yes and, as here in both instances, the decision maker was not a principal, we should next ask whether a reasonable juror could find the decision maker served the employer in a managerial capacity. *See id.* at 2128-29. Again, if the answer is no, Circuit City prevails. However, if the answer is yes, we must ask whether a reasonable juror could find that the decision maker acted within the scope of her employment in making the challenged decision. *See id.* at 2129. If the answer is no, Circuit City prevails. Finally, if the answer to this question is yes, we must ask whether a reasonable juror could only conclude that Circuit City engaged in good-faith efforts to comply with §1981. *See id.* at 2129; *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999) (analyzing evidence of employer's good-faith efforts of anti-discrimination in context of Rule 50(b) motion). If the answer to this question is yes, Circuit City prevails. If the answer is no, we must affirm the district court's refusal to grant Circuit City's motion for judgment as a matter of law on the issue of punitive damages with respect to that plaintiff.

We now proceed to answer this series of questions with respect to Lowery and Peterson individually.

1. *Lowery*

   a. Perceived Risk of Violating Federal Law.

We conclude the record contains sufficient evidence, when viewed in the light most favorable to Lowery and giving her the benefit of all reasonable inferences, for a reasonable juror to find that in intentionally refusing to promote Lowery to the position of

Supervisor of Management Recruiting, Turner did so in the face of a perceived risk that her decision would violate federal law. *See Kolstad*, 119 S. Ct. at 2125. The record contains evidence that Turner knew taking race into account in making significant employment decisions such as denying promotions violates federal law. Specifically, a reasonable juror could infer that Turner had knowledge of the existence of federal anti-discrimination laws from Circuit City's evidence that it required every person in management to attend a week-long training seminar that included education on the federal anti-discrimination laws. *See EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1246 (10th Cir. 1999) (holding in a post-*Kolstad* case that a reasonable jury could have found that the employer intentionally discriminated against its employee on account of his disability in the face of a perceived risk that its action would violate federal law from evidence that the store manager who approved employee's suspension was familiar with the accommodation requirements of the Americans With Disabilities Act and its prohibition against discrimination and retaliation in the workplace).

b. *Managerial Capacity.*

We also conclude that, when the evidence is viewed in the light most favorable to Lowery, and she is given the benefit of all reasonable inferences, a reasonable juror could find that Turner served Circuit City in a managerial capacity. In making this determination, we must consider the type of authority that Circuit City gave Turner and the amount of discretion that she had in what was done and how it was accomplished. *See Kolstad*, 119 S.Ct. at 2128. Turner managed the entire department responsible for recruiting potential employees to fill non-managerial positions at Circuit City.[4] At the time Turner first assumed the position of

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[4] In addition to the responsibility of recruiters to attend job fairs and engage in other recruitment efforts, Turner testified that her department performs the following functions:

> Manager will call to ask for assistance in filling positions. Other Human Resources Associates throughout the country

manager of the Management Recruiting Department she supervised nine recruiters. Circuit City gave Turner authority to expand the department such that by the time of trial, October 1996, Turner's department had twenty-one recruiter positions. Turner had authority to hire persons to fill budgeted positions in her sole discretion without first consulting her boss Zierden. Circuit City also allowed Turner the discretion to organize her department any way she wanted. From this evidence, a reasonable juror could find that Turner served Circuit City in a managerial capacity for purposes of vicarious liability in the punitive damages context. Although Turner was not top management, nor an officer or director of the corporation, she nonetheless held an important position at Circuit City. *See Wal-Mart Stores, Inc.*, 187 F.3d at 1247 (holding in a post-*Kolstad* case that Wal-Mart assistant store manager occupied managerial position for purposes of vicarious liability in the punitive damages context where assistant manager had independent authority to suspend her subordinates and could also make hiring and firing recommendations; and holding that Wal-Mart store manager occupied managerial position for purposes of vicarious liability in the punitive damages context where responsibilities of store manager include ensuring the smooth operation of the store and making hiring and firing decisions).

c. *Scope of Employment.*

Under *Kolstad*, the next inquiry is whether Turner acted within the scope of her employment in refusing to promote Lowery on account of her race. *See Kolstad*, 119 S. Ct. at 2128. Under *Kolstad*, the applicable test is whether Turner's

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> will call for assistance in designing and placing recruitment advertising, designing fliers, designing posters. We also provide phone screening support, phone interviews, for all of our new stores around the country. So we might have District Managers or Personnel Managers on the phone asking for assistance. It is a wide variety of Associates within the company whom we consider a customer.

(Plaintiff's Supplemental Appendix on Remand 136).

conduct is of the kind Turner was employed to perform, occurred substantially within the authorized time and space limits, and is actuated, at least in part, by a purpose to serve the employer. *See id.* (adopting Restatement (Second) of Agency's scope of employment test for intentional torts but modifying it to provide a good-faith exception). The evidence, when viewed in the light most favorable to Lowery, and giving Lowery the benefit of all reasonable inferences, is more than sufficient to meet this test.[5] Selecting persons for promotion is the kind of conduct Circuit City employed Turner to perform. Furthermore, Turner's failure to promote Lowery occurred during working hours and on company property. Finally, the evidence supports a finding that Turner failed to promote Lowery at least in part for the purpose of serving Circuit City.

d. *Good-Faith Efforts to Comply with Title VII.*

Thus far, the evidence, when viewed in the light most favorable to Lowery, and giving her the benefit of all reasonable inferences, is sufficient to establish: (1) that Turner, acting as agent for Circuit City, intentionally refused to promote Lowery, on account of her race (as found by the jury) in the face of a perceived risk that doing so would violate federal law; (2) that Turner served Circuit City in a managerial capacity; and (3) that Turner acted within the scope of her employment in refusing to promote Lowery. Nonetheless, we must vacate the punitive damages portion of the judgment in favor of Lowery, if we conclude, after viewing the evidence in the light most favorable to Lowery, and giving her the benefit of all reasonable inferences, that a reasonable juror could only conclude that Circuit City engaged in good-faith efforts to comply with §1981. *See Kolstad,* 119 S. Ct. at 2129; *Deffenbaugh-Williams*, 188 F.3d at 286 (analyzing evidence of employer's good-faith efforts of

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[5] Circuit City does not seriously dispute that the scope of employment test, without considering the good-faith exception, is met here.

anti-discrimination in context of Rule 50(b) motion). This good-faith exception rests on the notion that the existence and enforcement of an anti-discrimination policy shows that the employer itself "never acted in reckless disregard of federally protected rights." *Kolstad*, 119 S. Ct. at 2129 (internal quotation marks omitted). On the issue of its alleged good-faith efforts to comply with §1981, Circuit City chiefly points us to its efforts to educate its employees about its company-wide policy entitled " Treating Associates with Respect" and the three avenues of complaint allegedly available to Circuit City employees suspicious of illegal employment discrimination in the workplace—the Open Door Policy, the Associate Cool Line, and Coffee Conferences. According to Circuit City's "Treating Associates with Respect" policy, Circuit City allegedly committed not to discriminate against its employees on account of factors made illegal by federal anti-discrimination statutes such as §1981 and Title VII. The record contains evidence that Circuit City sent out posters reflecting this policy to its retail stores, included the policy in its 1991 employee handbook, conducted some individual employee training sessions regarding the policy in 1991 or 1992, and required every managerial and supervisory employee to attend a week-long training seminar called "Managing Through People," a small part of which included education on the federal anti-discrimination in employment laws.

Countering Circuit City's evidence of its alleged good-faith efforts to comply with §1981 is evidence in the record: (1) that two top Circuit City executives harbor racial animosity toward African-Americans;[6] (2) that one of these

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[6] Here, we are referring to Zierden and Ligon. When the following comments by Zierden are viewed in the light most favorable to Lowery, a reasonable juror could find that Zierden harbored racial animus toward African-Americans: (1) "the caliber of minorities and blacks who are in the company, in Circuit City, would not meet the standards for a corporate headquarters job," (J.A. 3145); (2) blacks who worked for Circuit City "had a propensity to steal," (J.A. 3145-46); (3) "he didn't see th[e]

top executives buried two internal reports reflecting a negative attitude on behalf of Circuit City against racial minorities and failed to take any remedial action in response to the negative findings in the reports; (3) that African-American employees feared retaliation by Circuit City for use of the Open Door Policy, the Associate Cool Line, and Coffee Conferences to complain about discrimination; and (4) that several African-American employees and former employees of Circuit City felt intimidated by Circuit City in response to their complaints to management about racial animus in promotion procedures. Finally, while the fact that Circuit City had a very subjective and unstructured promotional system in place does not alone suggest a secret corporate policy at Circuit City to keep African-Americans in low level positions, *see Vaughan v. Metrahealth Cos.*, 145 F.3d 197, 204 (4th Cir. 1998), when this fact is coupled with the fact that the Circuit City executive responsible for the system harbors racial animus towards African Americans, a reasonable juror could infer that the system was implemented in an effort to mask such a corporate policy, *see Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975) (recognizing the capacity of non-objective hiring standards to mask employer's refusal to hire because of race).

After considering the conflicting evidence just set forth regarding the good-faith efforts issue, we are not persuaded that a reasonable juror could only conclude that Circuit City engaged in

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situation [of few if any African-Americans in decision making roles at Circuit City] changing anytime soon because...those people who would be maybe [sic] eligible to be promoted just weren't there," (J.A. 3148), and (4) "when you hire a black store manager, sales go down, customers come in and wonder what's going on," (J.A. 2135).

When the following comments by Ligon are viewed in the light most favorable to Lowery, a reasonable juror could find that Ligon harbored racial animus toward African-Americans: (1) Lowery, an African-American, "should go to a company that's more receptive to minorities", (J.A. 2091-92); and (2) Lowery should go to a company like Pepsi-Cola that "put [minorities] in decision-making roles," (J.A. 2091).

good-faith efforts to comply with §1981. While an employer's institution of a written policy against race discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind with respect to racial minorities, such a policy is not automatically a bar to the imposition of punitive damages. *See Harris v. L & L Wings, Inc.*, 132 F.3d 978, 983-84 (4th Cir. 1997). Here the sincerity of Circuit City's commitment to a company-wide policy against racial discrimination in the workplace is called into question when one considers the racially discriminatory attitudes of two top Circuit City executives and the implementation of a promotional system by one of those executives having the capacity to mask race discrimination in promotional decisions. Furthermore, the positive nature of Circuit City's Open Door Policy, Associate Cool Line, and Coffee Conferences in reflecting Circuit City's attempt to offer employees an avenue to complain about racial discrimination without intimidation or fear of retaliation is countered by evidence of employees who testified they felt ignored or intimidated for complaining about promotion procedures and feared retaliation if they used one of these venting procedures to complain about racial animus among Circuit City management. Other evidence suggesting that Circuit City's purported efforts to comply with §1981 were not taken in good-faith, but with the intent to cover-up a corporate policy of keeping African-Americans in low level positions, is Zierden's burying of the Booth and Cook reports. Because we are unable to conclude that a reasonable juror could only find that Circuit City engaged in good-faith efforts to comply with §1981, and because we conclude that in intentionally failing to promote Lowery, Turner acted in the face of a perceived risk that her action violated federal law, in a managerial capacity, and within the scope of her employment, we hold the district court did not err in denying Circuit City's Rule 50(b) motion with respect to Lowery's prayer for punitive damages on her §1981 claim. Accordingly, we affirm the portion of the judgment entered in favor of Lowery awarding her punitive damages.

2. *Peterson.*

a. *Perceived Risk of Violating Federal Law.*

We conclude the record contains sufficient evidence, when viewed in the light most favorable to Peterson, and drawing all reasonable inferences in her favor, for a reasonable juror to find that in intentionally refusing to promote Peterson to the position of Assistant Supervisor of the Customer Service Mail Department, Bischoff did so in the face of a perceived risk that her decision would violate federal law. *See Kolstad,* 119 S. Ct. at 2125. Specifically, a reasonable juror could infer that Bischoff had knowledge of the existence of federal anti-discrimination laws from Circuit City's evidence that it required every person in management to attend a week-long training seminar that included education on the federal anti-discrimination in employment laws. *See Wal-Mart Stores, Inc.,* 187 F.3d at 1246.

b. *Managerial Capacity.*

We also conclude that, when the evidence is viewed in the light most favorable to Peterson, and all reasonable inferences are drawn in her favor, a reasonable juror could find that Bischoff served Circuit City in a managerial capacity. In making this determination, we must consider the type of authority that Circuit City gave Bischoff and the amount of discretion that she had in what was done and how it was accomplished. *See Kolstad,* 119 S. Ct. at 2128. Bischoff managed the Customer Service Mail Department at FNANB, the wholly-owned subsidiary of Circuit City. She had three supervisors reporting to her; each supervisor had an assistant supervisor; and approximately fifteen employees reported to each assistant supervisor. Bischoff had the authority to make personnel decisions, including promotional decisions, without guidelines or review, and thus was able to make personnel decisions without any objective criteria or accountability. Although several layers of management existed above Bischoff at FNANB, a reasonable juror could find from this evidence that Bischoff served FNANB in a managerial capacity for purposes

of vicarious liability in the punitive damages context. *See Wal-Mart Stores, Inc.*, 187 F.3d at 1247.

c. *Scope of Employment.*

Under *Kolstad*, the next inquiry is whether Bischoff acted within the scope of her employment in refusing to promote Peterson on account of her race. *See Kolstad*, 119 S. Ct. at 2128. The applicable test is whether Bischoff's conduct is of the kind she was employed to perform, occurred substantially within the authorized time and space limits, and is actuated, at least in part, by a purpose to serve the employer. [7] *See id.* The evidence, when viewed in the light most favorable to Peterson, is sufficient to meet this test. Selecting employees for promotion is the kind of conduct Circuit City employed Bischoff to perform. Furthermore, her failure to promote Peterson occurred during working hours and on company property. Finally, the evidence supports an inference that Bischoff failed to promote Peterson at least in part for the purpose of serving Circuit City.

d. *Good-Faith Efforts.*

Given our treatment of Circuit City and FNANB as a single employer, our analysis of the good-faith efforts issue with respect to Lowery applies equally with respect to Peterson. Accordingly, we hold the district court did not err in denying Circuit City's Rule 50(b) motion with respect to Peterson's prayer for punitive damages on her §1981 claim. We, therefore, affirm the portion of the judgment entered in favor of Peterson awarding her punitive damages.

III.

Our resolution of the punitive damages issue on remand from the Supreme Court necessitates our revisiting the

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[7] Circuit City does not seriously dispute that this scope of employment test, without considering the good-faith exception, is met here.

propriety of the district court's general award of attorneys' fees and costs due the Plaintiffs. In part VII of *Lowery I*, we held that viewing the case as a whole, including the fact that Lowery and Peterson recovered only $16,700 in compensatory damages, the Plaintiffs achieved a very low degree of success. *See id* at 767-68. In light of this, we held that the district court abused its discretion in awarding the Plaintiffs all of their accrued attorneys' fees and costs amounting to nearly $4 million. *See id.* at 768. We then vacated the district court's general award of attorneys' fees and costs and remanded the case to the district court for a redetermination of the award in light of our opinion. *See id.*

While we still believe the district court abused its discretion in granting the Plaintiffs a general award of attorneys' fees and costs in the amount of nearly $4 million, we acknowledge that our affirmance on remand of the judgments in favor of Lowery and Peterson with respect to the award of punitive damages means the Plaintiffs achieved a higher degree of success in the case than we first determined. Accordingly, we vacate the district court's general award of attorneys' fees and costs, remand the case to the district court for a redetermination of the amount of the award in light of the same sentiments we expressed on the issue in *Lowery I*, with the modification that the Plaintiffs have achieved a higher degree of success than we determined in *Lowery I*.

IV.

In conclusion, we hold the district court did not err in refusing to grant Circuit City's Rule 50(b) motion with respect to Lowery and Peterson's prayer for punitive damages in regards to their §1981 claims. Accordingly, we affirm the judgments in favor of Lowery and Peterson to the extent they award Lowery and Peterson punitive damages. We vacate the district court's general award of attorneys' fees and costs in favor of the Plaintiffs and remand the case for a redetermination of the award in accordance with this opinion. Finally, without further discussion, we reaffirm our holdings

and analysis as stated in *Lowery I* with respect to the issues raised on appeal by Circuit City and on cross appeal by the Plaintiffs that are unrelated to the issue of punitive damages and the general award of attorney's fees and costs.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 5, 2000

No. 97-1372
CA-95-964
LOWERY v. CIRCUIT CITY STORES

No. 97-1470
CA-95-964
MCKNIGHT v. CIRCUIT CITY STORES

No. 97-1917
CA-95-964
MCKNIGHT v. CIRCUIT CITY STORES

No. 98-1170
CA-95-964
LOWERY v. CIRCUIT CITY STORES

MANDATE

The judgment of this Court dated 3/14/00 takes effect today.

Patricia S. Connor, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1372

RENEE LOWERY; LISA S. PETERSON,
Plaintiffs-Appellees,

and

SHELBY MCKNIGHT; GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WASHINGTON LEGAL FOUNDATION; EQUAL EMPLOYMENT ADVISORY COUNCIL; NATIONAL RETAIL FEDERATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 97-1470

SHELBY MCKNIGHT; GREGORY FLEMING; RENEE LOWERY; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES; LISA S. PETERSON,
Plaintiffs-Appellants.

and

SONYA HAIRSTON; DYNELLE JOHNSON,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellee.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WASHINGTON LEGAL FOUNDATION; EQUAL EMPLOYMENT ADVISORY COUNCIL; NATIONAL RETAIL FEDERATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 97-1917

SHELBY MCKNIGHT; RENEE LOWERY; LISA S. PETERSON,
Plaintiffs-Appellees,

and

GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,
Amici Curiae.

No. 98-1170

RENEE LOWERY,
Plaintiff-Appellee,

and

SHELBY MCKNIGHT; GREGORY FLEMING; SONYA HAIRSTON; DYNELLE JOHNSON; NADRA SMITH; PONNETTE SMITH; SHEILA SMITH; PATRICIA SPENCER; EDWARD STOKES; LISA S. PETERSON,
Plaintiffs,

v.

CIRCUIT CITY STORES, INCORPORATED,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-95-964)

Argued: April 9, 1998
Decided: September 14, 1998

Before MURNAGHAN, WILKINS, and HAMILTON,
Circuit Judges.

OPINION

HAMILTON, Circuit Judge:

This case involves claims of racial discrimination brought by eleven African-American current and former employees (collectively, the Plaintiffs) individually and on behalf of all African-Americans employed at the Richmond, Virginia headquarters (HQ) of Appellant, Circuit City Stores, Inc. Circuit City appeals from a jury verdict finding that Circuit City engaged in a pattern or practice of racial discrimination and that Circuit City discriminated against plaintiffs Renee Lowery (Lowery) and Lisa Peterson (Peterson) on account of their race. Circuit City also appeals from the district court's grant of injunctive relief, punitive damages, costs and attorneys' fees. Finally, Circuit City appeals the district court's grant of a motion by Lowery to compel Circuit City's compliance with a portion of the injunctive relief ordered and the district court's award of her reasonable attorneys' fees and costs incurred in connection with her motion in an amount to be subsequently determined. The Plaintiffs

cross-appeal the district court's decertification of their class action. We affirm in part, vacate in part, and remand with instructions.

I

Circuit City owns and operates a rapidly growing chain of retail consumer electronic stores that by January 1996 employed 37,000 "associates" nationwide. By November 1996, Circuit City employed 3,500 people at its Richmond HQ, about 800 of whom were African-Americans. Several hundred other Circuit City employees work for a wholly-owned subsidiary called First North American National Bank (FNANB), which operates as a separate and distinct entity, providing consumer credit to Circuit City's customers.

Lowery, Peterson and the other nine Plaintiffs, Shelby McKnight, Gregory Fleming, Sonya Hairston, Dynelle Johnson, Nadra Smith, Ponnette Smith, Sheila Smith, Patricia Spencer and Edward Stokes, are African-American current and former employees of Circuit City and FNANB. The Plaintiffs filed this action in late 1995, alleging that Circuit City and FNANB (collectively, Circuit City) have a corporate culture of racial animus toward African-Americans, promulgated, fostered and condoned by a group of white senior managers. Plaintiffs claim that Circuit City's all-white management intentionally carried out their racial animus and stereotypical thinking through discriminatory promotion policies and practices that included, among other things: (1) excessively subjective procedures and criteria used to deny opportunities for promotion to qualified African-Americans; (2) making the existence of job promotion vacancies known only through informal networks of white employees rather than through formal job posting procedures; (3) requiring African-American employees to satisfy more onerous requirements for promotion than those required for white employees; and (4) maintaining more onerous performance standards for African-American employees than for similarly situated white employees.

A. *Evidence of a Pattern or Practice of Racial Discrimination*

Circuit City's promotion practices are developed in Circuit City's Human Resources (HR) Division. Between 1984 and 1996, HR was headed by William Zierden, a former business professor from the University of Virginia. Zierden believed that large companies are hampered by bureaucracy, including "rigid systems of job descriptions and rigid [qualifications]" for the people to fill job openings. (J.A. 2680). Zierden accordingly implemented an HR system which Circuit City claims limits bureaucracy and gives employees and managers wide freedom of action. Circuit City produced evidence that this philosophy has strong support among management experts.

Circuit City's management policy requires all managers and supervisors to attend a week-long "Managing Through People" seminar that instructs them in appropriate supervision. (J.A. 2194). Managers receive training on promotions, including how to interview and evaluate employees. According to Circuit City, managers are warned not to use impermissible selection criteria, and are admonished that "Circuit City firmly believes all associates and customers should be treated with respect. We have policies in place to achieve this goal. Circuit City is an equal opportunity employer who has set policies and standards to comply with all federal and state laws which forbid discrimination." (J.A. 1723).

The Plaintiffs claim that Circuit City's management style has encouraged and fostered racial discrimination in promotions. According to the Plaintiffs, Circuit City: (1) has no written procedures indicating how managers and supervisors should go about promoting employees; (2) has no written procedures or practices requiring a review, either by HR or anyone else, of any promotion decision; (3) does not require promoters to post or advertise job openings, but permits them to announce an opening to a single candidate of the promoter's own

choosing without notifying anyone else of the vacancy; and (4) when a job opening is posted, has no requirements about what the posting should contain. Furthermore, Plaintiffs allege that a promoter has unfettered discretion to use any procedures he or she desires when making a promotion decision. For example, a promoter has full discretion to establish the minimum qualifications necessary for a position and the weight to be given to the factors considered in making the decision. The Plaintiffs note that the majority of those making promotion decisions at HQ are white, and claim that the result of Circuit City's promotion policies is that only white employees are promoted above the assistant supervisor level.

Circuit City, on the other hand, argues that its promotion policies have produced a racially diverse work force. Circuit City claims that the percentage of African-American employees at HQ increased from 19.5 percent in 1992 to 22 percent in 1995, while the full-time African-American workforce outside the company averaged about 19 percent during this time. Circuit City notes that, of the 6,200 employees at HQ from 1992 to 1995, 1,564 were African-American, with about 100 in professional and managerial positions, and approximately 600 were members of other minorities. Moreover, Circuit City claims that, for each significant occupational category defined by the United States Census Bureau, Circuit City employs more African-Americans than the external labor pool would indicate. As an example, Circuit City mentions that from 1992 to 1995, it hired 375 people within the "officials and managers" category; although the relevant pool was only 4 percent African-American, Circuit City hired over 9 percent African-Americans.

Circuit City also claims that the vast majority of job openings are posted in a company-wide publication, via E-mail, and over a vacancy hotline. Nevertheless, while company policy favors posting vacancies, it does not require it. Moreover, Circuit City does not have formal career paths or mandatory company-wide promotion cri-

teria; instead, supervisors base promotions on many factors, including performance, length of service, time in position, and education. To be promoted, an employee generally must have served at least six months in his/her current position (three months in FNANB) without disciplinary action. However, these rules may be waived.

There is no measurement made by anyone at Circuit City, including HR, as to the effects of these promotion practices and procedures on African-Americans as compared to whites. Zierden could recall only four black managers at HQ during his tenure. Only two out of roughly fifty or sixty group managers and managers in the accounting division were African-American. At FNANB, there has never been an African-American director or manager, and only two African-Americans have risen above the assistant supervisor rank to the level of supervisor.

At trial, Plaintiffs attempted to demonstrate management's racial animus by introducing evidence that certain high level employees of Circuit City have made racially disparaging comments. For example, Zierden allegedly advised Larry Jones, an applicant for a position in HR, that "the caliber of minorities and blacks who are in the company, in Circuit City, would not meet the standards for a corporate headquarters type job, and in particular this type job." (J.A. 3145). He also allegedly said that blacks who worked in Circuit City's retail stores "had a propensity to steal." (J.A. 3145-46). As for blacks in decision-making roles at Circuit City, Zierden allegedly told Jones there were "few, if any," blacks in such jobs and "he didn't see that situation changing anytime soon because . . . those people who would be maybe eligible to be promoted upward just weren't there." (J.A. 3148). Zierden allegedly made similar comments to others. Complaints about Zierden to Circuit City's CEO, Rick Sharp, allegedly had no effect.

The Plaintiffs also attempted to demonstrate management's racial animus by introducing evidence that Zierden

"buried" two internal reports, known as the Booth and Cook Reports, that were critical of Circuit City's promotion policies and diversity results. In December 1990, Zierden instructed Karen Booth, an employee in HR, to perform a study of how well Circuit City manages diversity in its workplace. Booth's January 1991 report noted, among other things, that statistics on Circuit City's store employees showed that "[t]he promotion ratio for male and non-minority [sales] counselors are [sic] significantly higher than those for women and minorities." (J.A. 838). Booth concluded that "[i]t is my assumption that many female and minority associates look up the ladder and see no one there like themselves. They perceive no upward mobility beyond a certain level and they look for opportunities outside the company." (J.A. 864, 2641). Zierden allegedly directed Booth to retrieve all copies of the report that she had given to other managers, and never discussed the report with any other Circuit City executives. The Plaintiffs assert that Zierden never independently checked the accuracy of Booth's statistical findings, nor attempted any kind of statistical analysis of promotion rates between minorities and non-minorities or of differences in rates of salary growth between blacks and whites.

In May 1995, Circuit City retained Sarah Cook, a graduate student in psychology at the University of Virginia, to conduct a survey and prepare a written report on employee job satisfaction at FNANB. Cook worked on the project for approximately seven months, was paid approximately $6,500 by Circuit City, and produced a written report in January 1996. Cook's report noted, among other things, employee concerns that one had to belong to certain cliques in order to get promoted, and that minorities felt excluded. Comments by survey respondents included: "I hate to express this but race affects promotions" and "Minorities are constantly overlooked for promotions and will continue to be overlooked until someone takes legal action against FNANB." (J.A. 1106). Cook's report concluded that a sizeable number of asso-

ciates perceived that minority associates are not treated equally to majority associates. Cook had recommended that Circuit City review its company policies and practices, but noted that the company's response was defensive and dismissive.

Circuit City never distributed the Cook report to its employees, but instead circulated a short memorandum purporting to summarize the survey's results. The memorandum said nothing about Cook's findings and recommendations about promotion procedures. Moreover, according to the Plaintiffs, Circuit City took no action concerning the complaints about promotions, and made no changes in its promotion practices.

B. *Evidence of Individual Discrimination*

In addition to the allegation of a pattern or practice of discrimination, the Plaintiffs claimed they suffered individual discrimination due to their race. Plaintiff Lowery joined Circuit City in October 1989 as a management recruiter in HR after completing her MBA. Lowery's manager, Catharine Madden, gave Lowery high performance reviews through mid-1994, although it appears Madden gave most of her employees high ratings. Lowery performed her recruiting responsibilities well, exceeding her numerical recruiting goals through July 1995, and became Circuit City's most senior and highly paid recruiter. Despite this success, however, Lowery unsuccessfully sought approximately seven promotions in seven years.

Circuit City produced evidence that, notwithstanding Lowery's recruiting skills, she had several problems throughout her tenure. Although Lowery performed well for some hiring managers, Circuit City claimed she neglected following up for others, and one recruiter even asked not to work with her again. Evidence was presented that she had problems training new recruiters, showed little leadership and, according to her peers, she

was not a team player. Circuit City asserted that Lowery did not participate in staff meetings, volunteer to attend job fairs, or share resumes with other recruiters. She also allegedly lacked focus in interviews, and one African-American supervisor found Lowery's oral style rambling and unstructured. When Lowery asked how to improve her chances of being promoted, she allegedly failed to take the steps that were suggested.

Lowery also presented evidence of Circuit City's alleged animus towards minorities. Lowery discovered, years after the fact, that the words "velveteen ghetto" had been handwritten on her 1989 interview schedule. (J.A. 881, 2137-38). She testified at trial that, in 1991, when she approached Austin Ligon, Vice President of Corporate Planning, about a position in his department, he suggested that she "could do better someplace else" at a company that was "more receptive to minorities and women." (J.A. 2091). Later, in 1993, Zierden allegedly told her he believed that sales decreased in stores with black managers, and that stores with Hispanic managers soon had only Hispanic employees.

One of Lowery's claims involved her application in October 1994 for a promotion to Supervisor of Management Recruiting. Cynthia Turner, Lowery's new manager, wanted to promote one of the department's recruiters to the position. Turner interviewed everyone in the department including Lowery and Paige Bell, who, along with Lowery, had also expressed interest in the position. The promotion was offered to Paige Bell, and Lowery asserts this decision was because Bell was white. Lowery noted that, while she had an undergraduate business degree and an MBA, Bell had neither. Lowery also had more supervisory experience before joining Circuit City, and had more seniority. Jeanne Linton, then the director of recruiting, testified that Lowery was one of her top three recruiters, yet admitted that the other two top recruiters, both of whom were white, were promoted to supervisory

positions within five years of starting with Circuit City, while Lowery has never been promoted during her seven years with the company.

Circuit City, on the other hand, claims Bell got the position because she was more organized than Lowery. For example, Circuit City produced evidence that, during her interview, Bell used an outline she had prepared which described ways to improve the department. Lowery, by contrast, allegedly rambled her way through the interview. Moreover, Circuit City claimed that there had been no complaints about Bell's recruiting style, that she participated in staff meetings and job fairs, and had once even managed the department while Madden was on leave and had earned her colleagues' respect.

Plaintiff Peterson also alleges she was passed up for promotion because of her race. Peterson joined FNANB in February 1993 as an account management representative. In July 1993 she entered FNANB's training program, which rotates associates through different departments every few months. In May 1994, Peterson rotated into an acting assistant supervisor position in the customer service mail department. It appears that Peterson again rotated into that department some time later. When a regular position became available in that department, Peterson applied for the position. Peterson's supervisor, Jodi Bischoff, rejected Peterson in favor of Janet Whalen, who is white. However, when offered the position, Whalen turned it down. Nevertheless, Circuit City did not then offer the promotion to Peterson, but allegedly handpicked another employee, Denise Ramos, for the position. Peterson left FNANB soon thereafter.

Peterson presented evidence that she was employed at FNANB at a time in which it grew from seven to 1,200 employees, and yet FNANB had no African-Americans among its twenty to thirty directors and managers, and had only two African-Americans among its thirty to forty lower-

level supervisors. Throughout her employment she received consistently high performance evaluations, allegedly until she applied for promotion. According to Peterson, Whalen had less experience than she did because Whalen had only one rotation as an FNANB trainee; Whalen never received supervisory experience in the customer service mail department; and Whalen had no familiarity with the reports and monitoring expected of an assistant supervisor in that department.

According to Peterson, Ramos had no prior customer service experience, no knowledge of the operating functions of the bank, no background contacting customers, and no knowledge of the company's computer system. Witnesses for Circuit City also admitted that, when Ramos was selected for the position, she was struggling in her current assistant supervisory position in another department and could not keep pace with her duties.

Circuit City, on the other hand, presented evidence that Whalen was selected over Peterson because Whalen was better qualified. While Peterson did not possess the college degree that FNANB preferred for supervisory positions, Whalen was a college graduate and former assistant supervisor. Bischoff testified that Peterson was also rejected because her performance was deficient during her two rotations as assistant supervisor. Peterson had been repeatedly cautioned for wasting work time by socializing with her supervisees, had submitted late and inaccurate monthly reports, and had completely failed to distribute three other reports. Moreover, Peterson allegedly could not competently analyze reports to identify trends in customer behavior. Finally, Circuit City alleges that Peterson received several oral warnings about her responsibilities, but she still neglected her supervisory role while she attempted to master the paperwork.

C. *Proceedings in the District Court*

Plaintiffs filed this case in the United States District Court for the District of Maryland on October 31, 1995, alleging, pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, that they represented a class of African-American current and former employees at HQ who were victims of Circuit City's intentional pattern or practice of racial discrimination in employment.[1] In all, Plaintiffs' complaint alleged fifty instances of discriminatory hiring, promotions and transfers at HQ. The Plaintiffs sought: (1) a declaration that Circuit City's actions violate Title VII and § 1981; (2) a permanent injunction prohibiting Circuit City from engaging in racially discriminatory conduct and requiring it to take measures to dismantle its racially discriminatory practices; (3) compensatory damages for financial loss, humiliation, embarrassment, emotional distress, mental anguish, deprivation of the right to contract on an equal basis with other persons regardless of race and deprivation of opportunities of promotion, compensation and transfer; (4) punitive damages; and (5) an award of attorneys' fees and expenses.

On November 29, 1995, the Maryland District Court transferred the case to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a). On February 25, 1996, the district court dismissed the claims of Hairston and Johnson as time barred, leaving a suit aggregating forty-six claims by nine Plaintiffs.

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[1] The original complaint only alleged claims under § 1981. In addition, Peterson filed her case separately, but the district court consolidated her case with that of the other ten plaintiffs. The Plaintiffs later amended their complaint to include class action claims under Title VII and to add Peterson as a plaintiff.

On April 30, 1996, the district court granted the Plaintiffs' motion to certify the suit as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2). The district court certified a mandatory, non-opt-out class composed of all African-Americans employed at HQ after April 18, 1992. The district court found that the Plaintiffs satisfied the commonality, typicality, adequacy of representation, and numerosity requirements of Federal Rule of Civil Procedure 23(a) in alleging that subjective decision-making processes had caused racial discrimination against black Circuit City employees. Noting that Rule 23(b)(2) certification is typically granted in employment discrimination cases even where monetary damages are requested, the district court certified the class in accordance with Rule 23(b)(2). However, the district court stated that the certification was conditional; if events so warranted, the district court reserved the ability to alter or decertify the class puruant to Rule 23(c)(1).

On August 23, 1996, the district court, *sua sponte,* did in fact decertify the class because of what it deemed problems of fairness and efficiency. During discovery, the Plaintiffs had filed a list of forty-six non-named class members they planned to call as trial witnesses, and acknowledged the existence of perhaps 200 additional class members with claims. Plaintiffs moved to have the district court sever the issues and adopt a bifurcated trial plan whereby the case would be tried in two stages. In Stage 1, a jury (the Class Jury) would decide class-wide liability and punitive damages, along with liability and compensatory damages on the individual claims. In Stage 2, compensatory damages for class members would be determined.[2]

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[2] The Plaintiffs' proposed trial plan was as follows. In Stage 1, the Class Jury would determine: (1) class-wide liability, including whether Circuit City engaged in a pattern or practice of racial discrimination with respect to promotions or transfers at HQ; (2) class-wide punitive damages; (3) liability and compensatory damages for the named Plaintiffs. At the conclussion of Stage 1 the

The district court determined that a class action would be unfair and inefficient. First, the determination in Stage 1 of punitive damages for the entire class would be based only on evidence of (1) disparate treatment as to the class and (2) actual harm and compensatory damages as to the named Plaintiffs. In other words, the Class Jury would make its determinations without the entire universe of information, including actual harm to the individual class members and Circuit City's legitimate, non-discriminatory reasons for allegedly adverse employment actions. The district court found this to be unfair to Circuit City. Second, the district court found the method of trying class members' claims to a series of two-week juries to be cumbersome and inefficient. Moreover, evidence Circuit City would bring forth to rebut individual claims in Stage 2 would be relevant and admissible in Stage 1, thus inviting the needless repetition of evidence. The district court concluded that the benefits of class certification—accelerated and efficient disposition—would not necessarily follow in the case, but unfairness to Circuit City would be a likely result.

The district court held that the trial of the individual Plaintiffs' claims would proceed to trial as scheduled, where the issues of individual liability, damages and puni-

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Class Jury would be discharged and, if appropriate, the court would grant declaratory and/or injunctive relief.

If there was a finding of class-wide discrimination during Stage 1, then Stage 2 proceedings would commence. Notice of claims would be sent to class members, who would be allowed to file claims. The parties would be permitted to conduct limited discovery concerning these claims, and the class members' claims would be tried to a series of separate juries, each sitting for approximately two weeks, until the claims of all class members had been heard. These separate juries would determine whether each class member was a victim of Circuit City's discriminatory conduct and, if so, the amount of compensatory damages to be awarded to that class member. Finally, the court would determine and award each Plaintiff and class member receiving compensatory damages a portion of the total punitive damages approved by the court.

tive damages would be litigated. The district court held that the Plaintiffs would be allowed to produce evidence at trial of pattern or practice discrimination, and Circuit City would be permitted to fully defend the pattern or practice claim. If there was a finding of pattern or practice discrimination, the district court stated that Circuit City would be collaterally estopped from denying the existence of such discrimination at subsequent trials. Finding this method of case management to be more fair and efficient, the district court decertified the class. However, the district court granted the Plaintiffs' motion to stay the order decertifying the class until the end of the trial.

On October 23, 1996, the district court granted Circuit City's motions for summary judgment as to the claims of N. Smith, S. Smith and Spencer. Thus, nineteen claims by six Plaintiffs went to trial. Trial commenced on October 28, 1996, and lasted for one month. At the beginning of the trial, the district court re-emphasized the procedural posture of the case, stating "[t]his is a case involving six individual plaintiffs. . . . Don't misunderstand." (J.A. 2042-43).

The majority of Plaintiffs' case focused on the pattern or practice of discrimination that allegedly resulted from Circuit City's insufficiently regimented management practices. The Plaintiffs presented the testimony of twenty-three African-American employees or former employees at Circuit City's HQ. Many of these witnesses testified they left Circuit City because they were frustrated by seeing whites get promoted while they stayed in non-managerial positions. Many witnesses testified they (1) often learned of promotions only after white co-workers had been selected by a white supervisor without posting or otherwise advertising the existence of the opportunity; (2) were ignored or intimidated for complaining about promotion procedures; (3) feared retaliation if they used Circuit City's "open door" procedures; (4) were subjected to racial slurs from their supervisors, or to remarks evi-

dencing a corporate culture of stereotypical thinking and racial animus; and (5) received lower performance ratings, making them then ineligible for promotions, after Circuit City learned of their involvement in this action.

Plaintiffs also presented at trial the testimony of a statistical expert, Dr. Andrew Harless, a labor economist. In his written report and testimony during the trial, Harless opined that: (1) the promotion rates for black employees at HQ from April 1992 through December 1995 were substantially lower than the promotion rates for similarly-situated white employees; and (2) those differences were at a statistically significant level well beyond that normally applied in academic and scientific research. Circuit City introduced its own statistical experts, Drs. Joan Haworth and Peter Kolesar, who refuted Harless' conclusions, and opined that his statistics showed no evidence of racial discrimination.

At the close of the Plaintiffs' case, Circuit City moved for judgment as a matter of law on the claims of the remaining six Plaintiffs and the issue of whether Circuit City had engaged in an intentional pattern or practice of racial discrimination. The district court granted Circuit City's motion for judgment as a matter of law on the claims of P. Smith, Fleming and Stokes, but denied their motions with regard to the claims by Lowery, Peterson, and McKnight. As for the pattern or practice issue, the district court held that it was "a classic situation where a jury needs to resolve the matter." (J.A. 2824).

On instructing the jury, the district court stated that the jury had to resolve the pattern or practice question before considering whether any of the specific claims of discrimination had been established. The district court submitted a special verdict form to the jury containing twenty-four questions. The first question inquired whether the jury found that Circuit City had engaged in a pattern or practice of racial discrimination in promotions against

its former and present African-American employees at its Richmond, Virginia headquarters. The district court instructed the jury that, if they answered the question in the affirmative, they were permitted—but not required—to infer that individual promotion decisions were affected by the pattern or practice. The special verdict form then asked whether Circuit City had discriminated against the three remaining Plaintiffs in fifteen claims for discrimination as to promotion. Finally, the district court entered an order lifting the stay of its earlier decertification order.

After deliberating for two and one-half days, the jury returned a verdict on December 2, 1996. The jury unanimously found that (1) Circuit City had engaged in a pattern or practice of racial discrimination; (2) Circuit City had promoted Bell over Lowery because of race; and (3) Circuit City had promoted Whalen and Ramos over Peterson because of race. However, the jury rejected all of McKnight's claims, Lowery's other two claims, and Peterson's other eight claims. In all, the jury found in favor of the Plaintiffs on three of fifteen claims.

On Lowery's successful claim, the jury awarded her $12,500 in economic and compensatory damages and $225,000 in punitive damages. On Peterson's two successful claims, the jury awarded her $4,200 in economic and compensatory damages and $47,000 in punitive damages. On December 3, 1996, the district court entered judgment, including a judgment in favor of Plaintiffs on a pattern or practice claim. On March 12, 1997, the district court denied Circuit City's post trial motion to set aside the award of economic, compensatory and punitive damages or, in the alternative, for a remittitur, and denied Circuit City's renewed motion for judgment as a matter of law.

After a hearing on Plaintiffs' motion for a permanent injunction, the district court imposed a permanent in-

junction which: (1) prohibited Circuit City from engaging in any act or practice that has the purpose or effect of discriminating against any African-American employee at HQ because of his or her race; (2) required Circuit City to promote persons at HQ without regard to their race on the basis of objective, job-related and racially neutral standards; (3) prohibited Circuit City from taking "any adverse employment action against any African American employee or prior employee" (J.A. 772); (4) required Circuit City to create and staff a Department of Diversity Management, the Director of which would be principally responsible for insuring that Circuit City complied with the terms of the injunction, and the hiring of whom would be subject to comment by the Plaintiffs and court approval; (5) required Circuit City to develop within ninety days a program of diversity management, including methods and procedures to be used to prevent and eliminate discrimination with respect to promotions; and (6) required Circuit City to develop within ninety days of the Director's hiring a revised program for promotions at HQ, subject to comment by the Plaintiffs and approval, modification or rejection by the district court.

The district court set forth specific requirements that the new promotion programs must meet, including: (1) the use of common, written procedures and guidelines governing promotion selections; (2) the analysis of job openings to identify the criteria for selection; (3) the preparation of position descriptions; (4) the posting and dissemination to all HQ employees of notices of all job vacancies; (5) the keeping of records of all promotions, including the race of each applicant; (6) the review by the Director of Diversity of all promotion recommendations; (7) the establishment of career development and mentoring for all African-American employees at HQ; (8) the monitoring and measurement of the performance of all promoters; (9) the revision of procedures for granting merit reviews of all HQ employees; (10) the revision of procedures to handle racial discrimination complaints;

(11) the creation of a new diversity management training program for all promoters. The district court also required various and detailed reports from Circuit City's new Diversity Director.

In a separate section of the injunction, Section B, the district court ordered Circuit City to promote Lowery immediately to the position of Supervisor of Management Recruiting, or an equivalent position, and pay her the difference in salary and benefits that she would have earned between the date of the jury verdict and the date of her promotion.[3]

The district court retained jurisdiction of the case for at least five years, and thereafter for as long as would be required to carry out the purposes of its order. Breach of the injunction would entitle the Plaintiffs to file a motion for enforcement and for appropriate sanctions. Finally, Plaintiffs' counsel would be allowed to apply to the court quarterly for fees and expenses reasonably incurred in the monitoring and enforcement of the order.

Circuit City filed a timely appeal from the district court's judgment on the pattern or practice claim, the award of economic, compensatory and punitive damages to Lowery and Peterson, the injunction, and the denial of Circuit City's renewed motion for judgment as a matter of law. The Plaintiffs then cross-appealed from the district court's order decertifying the class action, the district court's orders dismissing the claims of the other six Plaintiffs, and the entry of judgment in favor of Circuit City on McKnight's claims. In addition, the Plaintiffs ask this Court to amend the pattern or practice judgment to include the entire class.

On June 25, 1997, the district court granted Plaintiffs' application for attorneys' fees and costs in the amount of

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[3] Because Peterson had left FNANB, the Plaintiffs' motion for a permanent injunction did not ask for, and the injunction did not grant, similar relief for Peterson.

$3,911,504. Relying mainly on its finding that Plaintiffs succeeded on the pattern or practice claim, "[a] significant issue in litigation which 'achieve[d] some of the benefit the parties sought in bringing suit,' " the district court stated that Plaintiffs obtained excellent results in their civil rights suit and their attorneys should recover a full compensatory fee. (J.A. 4370) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The district court rejected Circuit City's argument that, because only two of the original eleven Plaintiffs prevailed in the suit, and because the amount of damages awarded on only three out of fifty claims was very small, an award of attorneys' fees and costs of nearly $4 million was excessive. The district court made some minor adjustments in the number of hours billed, but essentially awarded full fees and costs to the Plaintiffs. Circuit City timely appealed this award of attorneys' fees and costs.

On July 15, 1997, we granted Circuit City's emergency motion to stay, pending appeal, all provisions of the injunction except those in Section B relating to Lowery.

On January 7, 1998, the district court granted a motion by Lowery to compel Circuit City's compliance with Section B of the injunction. The district court concomitantly ordered Circuit City to pay Lowery's "lawyers their reasonable attorneys' fees and costs incurred in connection with th[e] motion to compel compliance." (Supplemental J.A. 8). The district court then directed Lowery's attorneys to file fee and cost requests along with supporting documentation by January 16, 1998. Circuit City filed a notice of appeal from the district court's January 7, 1998 order.[4]

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[4] After briefing and oral argument in the instant consolidated appeal, on July 21, 1998, the district court ordered Circuit City to pay Lowery $46,075.00 in attorneys' fees and costs in connection with her motion to compel Circuit City's compliance with Section B of the injunction. This fee and cost award is the subject of a separate appeal that is not part of the instant appeal.

II

We first consider the Plaintiffs' cross-appeal of the district court's order decertifying their class action. We review a district court's decision to decertify a class action for abuse of discretion. *See Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305 (4th Cir. 1991) (citing *Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir. 1990); *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986)). Issues such as class action manageability are "properly committed to the district court's discretion, because that court generally has a greater familiarity and expertise with the practical and primarily factual problems of administering a lawsuit than does a court of appeals." *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (internal qoutation marks and ellipses omitted).

The Plaintiffs first argue that the district court erroneously decertified the class action because, if the four requirements of Federal Rule of Civil Procedure 23(a) are satisfied, the district court is not at liberty to consider other factors in deciding whether to certify a class. In effect, Plaintiffs argue that, once the requirements of Rule 23(a) are met, the district court loses its discretion to certify or decertify the class. This argument, however, does not comport with either the language of Rule 23 or this court's precedent. First, Rule 23 states that an action "may" be maintained as a class action if the listed requirements are met. *See* Fed. R. Civ. P. 23(a) and (b). The Rule does not say that, once the requirements are met, the district court "must" certify and maintain the suit as a class action.

Second, we have previously held that district courts have broad discretion in deciding whether to certify a class. *See In re Catawba Indian Tribe*, 973 F.2d 1133, 1136 (4th Cir. 1992). This broad discretion necessarily implies that the district court may appropriately consider factors other than those listed in Rule 23 in determining

whether to certify a class action. *See, e.g., Amchem Prods., Inc. v. Windsor,* 117 S. Ct. 2231, 2248 (1997) (stating that settlement is relevant to class certification); *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 159 (1982) (considering principles of efficiency and economy of litigation); *Califano v. Yamasaki,* 442 U.S. 682, 702-03 (1979) (stating that, when the district court is asked to certify a nationwide class, it is appropriate to consider both whether nationwide relief is appropriate and whether such a class would improperly interfere with other litigation in other judicial districts); *Boughton v. Cotter Corp.,* 65 F.3d 823, 827 (10th Cir. 1995) (stating that, in a case where injunctive relief was requested and certification was otherwise legally permissible under Rule 23 (b)(2), the district court did not abuse its discretion in refusing to certify the class because the relief sought was nonetheless primarily money damages); *In re A.H. Robins Co.,* 880 F.2d 709, 740 (4th Cir. 1989) (holding it was proper in determining certification to consider whether certification would "foster settlement of the case with advantage to the parties and with great saving in judicial time and services"), *abrogated on other grounds by Amchem,* 117 S. Ct. at 2247-48. *See also* 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1785, at 119, 122 (2d ed. 1986 and Supp. 1998) (stating that, in exercising the "broad discretion" to decide whether to allow a suit to proceed as a class action, some courts have ruled it is appropriate to take account of considerations not expressly addressed in Rule 23, including manageability in Rule 23(b)(2) cases) (collecting cases, including *In re A.H. Robins, supra*). *But see Forbush v. J.C. Penney Co.,* 994 F.2d 1101, 1105 (5th Cir. 1993) ("[Q]uestions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions."). If, as the district court found here, other factors exist that militate against trying the case as a class action, it is appropriate for the district court to decertify the class. *See Stott,* 916 F.2d at 139 ("[A]n order certifying a class must be reversed if it becomes apparent, at any time during the

pendency of the proceeding, that class treatment of the action is inappropriate.") (citing *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 273-76 (4th Cir. 1980)). As set forth above, the district court has such broad discretion to certify a class because it is intimately familiar with such practical and factual intricacies of the suit. *See Central Wesleyan College*, 6 F.3d at 185.

Here, the district court had legitimate concerns that trying the suit as a class action would be unwieldy and unfair to Circuit City. First, the district court rightly questioned whether the Plaintiffs' proposed trial procedure would be an efficient or accelerated method of disposing of the claims. While holding two-week trials with separate juries on the class members' claims would have doubtlessly been more efficient and accelerated than bringing dozens of individual suits, that fact does not require the district court to certify a class action that would nevertheless be inefficient and cumbersome.[5] Second, the district court had legitimate concerns about fairness. The Plaintiffs' proposed trial method would allow the Stage 1 jury to determine punitive damages before the Stage 2 jury hears evidence of actual harm to the class members or Circuit City's proffered justifications for its adverse employment decisions. It would have been entirely possible that the evidence adduced in Stage 1 would have resulted in stiff punitive damages, while the evidence of actual harm presented in Stage 2 would have shown that Circuit City's actions were not sufficient to merit compensatory damages, or even egregious enough to have

[5] We note that, in affirming the district court's decertification of the class due to concerns about case manageability, we do not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes. Nevertheless, because efficiency is one of the primary purposes of class action procedure, *see Falcon*, 457 U.S. at 159 (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)), we hold that in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome.

merited punitive damages. We cannot conclude that such concerns led the district court to abuse its discretion in decertifying the class.

The Plaintiffs also argue, as do several of the *amici curiae,* that decertification was inappropriate because (1) the statute of limitations began running against the class members; (2) each former class member will now have to retain counsel and file a separate suit; (3) class action procedure is an important tool for the effective enforcement of civil rights laws; and (4) courts routinely certify Title VII classes under Rule 23(b)(2). Similarly, *amici* NAACP and the EEOC argue that Rule 23(b)(2) was intended to facilitate the bringing of class actions in civil rights cases, and that class actions are a favored means for both ending systemic discrimination and obtaining full relief for all the victims of such discrimination. Although these statements may be absolutely true, they are beside the point. If we were to hold these factors to be the predominant considerations for certifying a civil rights class, then nearly every suit alleging a pattern or practice of discrimination would be certified for class action because these factors would exist in nearly every case. However, the Supreme Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification. *See Falcon,* 457 U.S. at 155-57; *East Texas Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 405-06 (1977).

In conclusion, we hold that the district court's concerns about fairness and efficiency did not lead it to abuse its discretion in decertifying the class action.

III

Circuit City next argues that the judgment of the district court with respect to the Plaintiffs' § 1981 and Title VII claims must be reversed because individuals do not have a private, non-class cause of action for pattern or practice discrimination and the Plaintiffs failed to offer either direct evidence of discrimination or circumstantial

evidence of discrimination sufficient to establish claims of disparate treatment under the *McDonnell Douglas* method of proof. The Plaintiffs, on the other hand, argue that an individual cause of action alleging a pattern or practice of discrimination by the employer should be permitted because "[t]here is absolutely no logical or legal reason why *any* plaintiff cannot prove his disparate treatment theory in a § 1981 and/or a Title VII claim" through a pattern or practice claim and, therefore, the method of proof set forth in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), is applicable. (Appellees' Br. at 15) (emphasis in original). We agree with Circuit City that individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII. We further agree, with the exception of plaintiffs Lowery and Peterson, that the Plaintiffs failed to offer either direct evidence of discrimination or circumstantial evidence of discrimination sufficient to establish claims of disparate treatment under the *McDonnell Douglas* method of proof.[6]

Section 707 of Title VII, 42 U.S.C. §2000e-6, allows the federal government, either through the EEOC or through the Attorney General, to bring a civil action directly against an employer charging systematic discrimination against a protected group. In these cases, the government has to demonstrate that there exists "a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII] . . . ." 42 U.S.C. § 2000e-6(a). The government's burden in a pattern or practice action is to "prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts.

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[6] Our case law recognizes that "the framework of proof for disparate treatment claims—that is, whether the employer intentionally discriminated against the employee—is the same for actions brought under Title VII or § 1981." *Mallory v. Booth Refrigeration Supply Co.*, 882 F.2d 908, 910 (4th Cir. 1989). Accordingly, our discussion below regarding the Plaintiffs' Title VII claims encompasses their claims under § 1981.

It ha[s] to establish by a preponderance of the evidence that racial discrimination [is] the company's standard operating procedure—the regular rather than unusual practice." *Teamsters*, 431 U.S. at 335-36 (footnote and internal quotation marks omitted). At this initial "liability" stage, the government is not required to prove that any particular employee was a victim of the pattern or practice; it need only establish a *prima facie* case that such a policy existed. *See id.* at 360. Once established, the burden of proof then shifts to the employer to demonstrate that the government's showing of a pattern or practice of discrimination is either inaccurate or insignifiant. *See id.* If the employer fails to rebut the government's *prima facie* case, the resulting finding of a discriminatory pattern or practice gives rise to an inference that all employees subject to the policy were its victims and are entitled to appropriate remedies. *See id.* at 362. Such a finding justifies an award of prospective relief, but the government may also seek individual relief for the victims of the discriminatory practice. *See id.* at 361. In such a case, the district court usually conducts proceedings in a "remedial" stage to determine the scope of individual relief. To obtain relief for individual employees, the government must demonstrate that the employees were actual victims of the policy. *See id.* at 362. However, the burden still remains on the employer to prove that the employee was denied an employment opportunity for lawful reasons. *See id.* at 361-62.

Although § 707 applies to suits brought by the government, the *Teamsters* decision implicitly endorsed the application of pattern or practice principles and rules of proof to class action lawsuits brought by private parties. *See id.* at 357-60. The courts of appeals have seized on that endorsement and permitted pattern or practice class action suits using the *Teamsters* method of proof. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986); *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978).

On the other hand, in a private, non-class action, where individual plaintiffs allege discrimination in violation of Title VII, the plaintiffs typically prove that discrimination by satsfying the shifting burden of proof scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. A plaintiff attempting to prove a Title VII claim of discrimination with circumstantial evidence must first establish a *prima facie* case. *See id.* at 802. In order to establish a *prima facie* case of, for example, failure to promote, the plaintiff must show: (1) she is a member of a protected group; (2) she applied for the position in question; (3) she was qualified for the position; and (4) she was rejected for the position in favor of someone not a member of the protected group under circumstances giving rise to an inference of unlawful discrimination. *See Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *Alvarado v. Board of Trustees of Montgomery Community College*, 928 F.2d 118, 121 (4th Cir. 1991). In a case such as this, where the plaintiffs are alleging that they were passed over for promotions because they were black, the fourth prong can be satisfied by a showing that the positions were filled by white applicants. *See Carter*, 33 F.3d at 458. Once the plaintiff has established a *prima facie* case of discrimination, the burden of production shifts to the employer to rebut the plaintiff's *prima facie* case by articulating a legitimate, non-discriminatory reason for the adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802. In a case such as the one before us, the employer may rebut the plaintiff's "*prima facie* case by demonstrating that the white selectee was better qualified for the position." *Carter*, 33 F.3d at 458. If the employer articulates a legitimate, non-discriminatory reason for the employment action, the plaintiff bears the burden of proving that the employer's articulated reason is a pretext for discrimination. *See id.*

At this point, the issue before us is whether individuals have a private, non-class cause of action for pattern or

practice discrimination and, thus, may avail themselves of the *Teamsters* method of proof. For the reasons stated below, we conclude that, although such plaintiffs may use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the *McDonnell Douglas* framework, individual plaintiffs are not entitled to the benefit of the *Teamsters* method of proof.

The Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination. Rather, the Court has noted that there is a "manifest" and "crucial" difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). In a class action pattern or practice case, the plaintiffs first litigate the common question of fact, i.e., whether the employer utilized a pattern or practice which discriminated against the class. *See id.* at 880. When the class plaintiffs prove the existence of a discriminatory practice, then that finding benefits them in the adjudication of individual claims by creating a presumption that the individual class members were victims of the discriminatory practice. *See Teamsters*, 431 U.S. at 361-62.

On the other hand, an individual plaintiff in a private, non-class action alleging employment discrimination is not litigating common questions of fact, but the discrete question of whether the employer discriminated against the plaintiff in a specific instance. *See McDonnell Douglas*, 411 U.S. at 802. Evidence of a pattern or practice of discrimination may very well be useful and relevant to prove the fourth element of a *prima facie* case, that the individual's adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination, *see Carter*, 33 F.3d at 458; *Alvarado*, 928 F.2d at 121, or that the employer's articulated reasons

for the adverse action was merely pretext, *see Carter*, 33 F.3d at 456, or to establish the plaintiff's ultimate burden. However, statistics alone cannot establish a *prima facie* case of individual disparate treatment, for all four elements of a *prima facie* case must be established. *See Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131-32 (11th Cir. 1984). The Supreme Court has never indicated that an inference of discrimination should arise in an individual case until the plaintiff has proved *all* elements of a *prima facie* case. *See McDonnell Douglas*, 411 U.S. at 802.

We also note that class action pattern or practice suits differ from disparate treatment suits in the nature of their remedies. Class action pattern or practice suits primarily seek to redress widespread discrimination and the harm suffered by the group of individuals subjected to that discrimination. Accordingly, the relief typically sought in class action pattern or practice suits is injunctive and may include such aspects as, for example, affirmative action plans and the altering of a seniority system. *See* 1 Larson, *Employment Discrimination* § 8.01[3], at 8-14 (2d ed. 1994). The need for such remedies can be determined without referring to matters such as the qualifications of a particular employee. On the other hand, in a private, non-class disparate treatment case, the plaintiff seeks to remedy individual harm. Accordingly, the relief typically sought involves reinstatement, hiring, back-pay damages, etc. Such remedies typically require the examination of the circumstances surrounding a single employment action involving the plaintiff.

In sum, because the Supreme Court has never applied the *Teamsters* method of proof in a private, non-class action for employment discrimination, and because the nature of the proof and remedies in class and government pattern or practice actions differs vis-a-vis private, non-class actions, we decline to give individual plaintiffs a pattern or practice cause of action or allow them to use the *Teamsters* method of proof.

The relevant case law on the subject supports our conclusion. In *Scarlett v. Seaboard Coast Line R.R.*, 676 F.2d 1043 (5th Cir. 1982), the Fifth Circuit rejected the plaintiffs' suggestion that they could use evidence of systematic discrimination *alone* to prove instances of individual discrimination, reasoning that individuals proceeding on circumstantial evidence of discrimination under Title VII must prove the elements of a discriminatory hiring claim as set forh in *McDonnell Douglas*. *See id.* at 1053. Despite evidence of a pattern or practice of discrimination, the court of appeals held that the plaintiffs did not have a claim because they had failed to prove all the elements of an individual claim. *See id.* Later, in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995), the Fifth Circuit stated, in the context of a private, non-class action suit, that "[a] 'pattern or practice' claim is not a separate cause of action, but merely another method by which disparate treatment can be shown." *Id.* at 1219. *See also Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866-67 n.6 (7th Cir. 1985) ("Plaintiffs' use of 'pattern-or-practice' language . . . seems to be misplaced, since such suits, by their very nature, involve claims of class-wide discrimination, and the five plaintiffs, while attacking policies that would have affected all of Jewel's women employees as a class, have stated only their individual claims, not a class action.").

Cox and *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979), cases cited by the Plaintiffs, are not in conflict with our holding. In *Cox*, the district court decertified the class, but nevertheless tried the individual plaintiffs' pattern or practice claims. *See Cox*, 784 F.2d at 1558. On appeal, the Eleventh Circuit approved of the pattern or practice claims, but only after it held that the district court had erroneously decertified the class. *See id.* at 1558-60. Thus, the pattern or practice claims in *Cox* were appropriately brought in the context of a class action case. *Cox*, does not, however, stand for the proposition

that individual plaintiffs may bring pattern or practice claims.

In *Davis*, the District of Columbia Circuit stated that "[s]tatistical proof may alone be used, without presentation of specific instances of discrimination, to establish a *prima facie* case of employment discrimination." *Davis*, 613 F.2d at 962. However, the court remanded the case for determination of whether the employee was denied promotion for lawful reasons and, presumably, for determination whether those reasons were merely pretextual. *See id.* at 966. Although we disagree with *Davis* that statistical evidence alone may be used to establish a *prima facie* case of employment discrimination, *see Carmichael*, 738 F.2d at 1131-32, *Davis* is consistent with our conclusion that private, non-class actions alleging employment discrimination would still follow the *McDonnell Douglas* proof scheme. "Even *Davis* . . . recognizes that once statistics have established a pattern of discrimination, each individual plaintiff must still establish that he has been denied an employment benefit in order to recover for particularized injuries." *Id.* at 1132 (internal alterations, ellipses and quotation marks omitted).

Because the Plaintiffs cannot avail themselves of the *Teamsters* method of proof, and because they do not have direct evidence of discrimination, we now turn to consider whether they established their disparate treatment claims under the *McDonnell Douglas* method of proof. We have carefully examined the evidence in the record and conclude that Plaintiffs Spencer, N. Smith, P. Smith, and Fleming failed to establish a *prima facie* case of discrimination under that method of proof. Additionally, S. Smith failed to establish a *prima facie* case with respect to one of her two separate claims. Spencer alleged she was twice passed over for Maintenance Coordinator because of her race. However, she did not present sufficient evidence that she applied for the position, or that

she had the minimum qualifications necessary for the position. Both N. Smith and P. Smith alleged they were denied promotions to Customer Service Supervisor due to their race. However, they both failed to prove they were qualified for the position because neither had ever served as Customer Service Assistant Supervisor as Circuit City required. Fleming alleged he was denied a promotion to Real Estate Relocation Coordinator in the Real Estate Department because of his race. However, he failed to prove he was qualified for the position because he never obtained his real estate license as Circuit City required for that position. No reasonable evidence was introduced showing that the licensing requirement was imposed as a pretext for racial discrimination. S. Smith alleged she was discriminatorily passed over for promotion to Division Accounting Analyst. However, the record is clear that she voluntarily withdrew her application and, thus, did not apply for the position. There is no indication it was futile to apply or that Circuit City somehow prevented her from applying. We therefore, affirm the grant of summary judgment and judgment as a matter of law against these Plaintiffs.

As for Stokes' claim and S. Smith's remaining claim, even if they established a *prima facie* case, we conclude below that they failed to demonstrate that Circuit City's articulated reasons for passing them up for promotion were pretextual. Stokes alleged that Circuit City failed to promote him to a position of Supervisor in the Merchandise Payables Department because of his race. Circuit City articulated that Kevin Gremer was selected for the position because he was more qualified than the other applicants. Critically, while Stokes offered evidence of his qualifications, including his experience as a Specialist in the Merchandise Payables Department, he failed to offer any evidence that his qualifications were superior to Gremer's qualifications. Indeed, Stokes fails to offer any evidence of Gremer's qualifications or lack thereof. The

mere assertion that Stokes was more qualified than Gremer is insufficient to establish pretext. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (stating that plaintiff cannot rely on conclusory allegations to create factual dispute warranting trial); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir. 1989) ("[A] plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action.").

S. Smith alleged she was passed over for promotion to Treasury Analyst because of her race. The job posting stated that the Treasury Department was "seeking a highly motivated and achievement-oriented team player with excellent communication and organizational skills." (J.A. 500). In addition, "[s]trong analytical and decision-making skills [were] essential" for the position. *Id.* After interviewing S. Smith, the promoter, Shelly Steadman, found that S. Smith's position as Specialist in the Merchandise Payables Department had not prepared her for the position of analyst in the Treasury Department. In addition, Steadman felt that S. Smith did not communicate with enough assertiveness. Steadman interviewed two other applicants—one white and one African-American—but felt that neither of them possessed the abilities needed for the position, either. After failing to fill the position, Steadman hired Janet Klingenburg as a temporary employee to prepare some reports that were in urgent need of completion. Klingenburg had a degree in accounting and was in the process of getting her accreditation as a Certified Public Accountant (CPA). She had been working as an actuary and, thus, possessed many of the analytical skills needed for the Treasury Analyst position. After preparing the report in a manner Circuit City described as "excellent," and demonstrating her assertiveness and communication, analytic and computer skills, Circuit City offered Klingenburg the Treasury Analyst position.

Circuit City stated that Klingenburg received the Treasury Analyst position because she was more qualified than S. Smith. S. Smith's response was that: (1) Klingenburg was new to Circuit City and, thus, not familiar with the Treasury Department; (2) CPA certification was not one of the posted job requirements; and (3) "assertiveness" was merely a subjective qualification used to discriminate against her because of her race. These responses did not sufficiently demonstrate that Circuit City's articulated reasons for selecting Klingenburg were pretextual. First, the job posting did not require familiarity with the Treasury Department, so it was not inappropriate to hire from outside Circuit City. Second, although the position did not require CPA certification, the fact that Klingenburg was seeking such certification demonstrated that she was a "highly motivated and achievement-oriented" person as the job posting requested. (J.A. 500). Finally, assertiveness is an inherent aspect of "excellent communication . . . and decision-making skills." *Id.* We therefore conclude that S. Smith failed to demonstrate that Circuit City's articulated reasons for rejecting her in favor of Klingenburg were merely pretextual.

Although a plaintiff in a Title VII action may sometimes be able to use statistical evidence of a pattern or practice of discrimination to help establish pretext, this is not such a case. Dr. Harless' statistical analysis of promotions at Circuit City failed to adequately control for factors other than race that could account for the disparity in promotions. One notable omission from Harless' study was the factor that educational level had on promotions at Circuit City. Even if a given educational level was not required for all positions at Circuit City, the record is clear—and common sense dictates—that for many positions educational background was crucial. However, the evidence in this case showed that, while fifty-five percent of HQ employees had college degrees, only thirty-three percent of Circuit City's African-American HQ employees were college graduates. Despite such a large dis-

parity in the educational levels of employees at Circuit City's HQ, Harless failed to consider how educational level affected promotions. We conclude that the failure to consider this factor is sufficiently serious so as to weaken the statistical study's probativeness. *See Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (Brennan, J., concurring in part, adopted by the full Court).

In sum, we affirm the grant of summary judgment against S. Smith, Spencer and N. Smith, and affirm the grant of judgment as a matter of law against Stokes, Fleming and P. Smith.[7]

IV

Next, Circuit City complains that several actions taken by the district court in managing discovery precluded Circuit City from establishing an effective defense. We disagree. We review a district court's actions in managing discovery for abuse of discretion. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 929 (4th Cir. 1995).

A

After the district court certified the class action, the parties moved for a clarification of the circumstances under which Circuit City could communicate directly with its African-American employees and former employees. The district court entered an order on May 31, 1996, limiting Circuit City's communications with African-

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[7] Circuit City argues that several errors in the district court's instructions necessitate reversal of Lowery and Peterson's individual discrimination claims. Circuit City also argues there was insufficient evidence for the jury to find in favor of Lowery and Peterson on their individual claims of discrimination. We have thoroughly reviewed these assignments of error and find them to be without merit. Accordingly, we affirm the district court's judgment with respect to Lowery and Peterson.

American employees to non-litigation related matters, and prohibiting all other communications except with prior consent of class counsel or the district court. The order also prohibited discovery of class members other than the named Plaintiffs and those class members whom the Plaintiffs intended to call as witnesses at trial. The basis for the district court's limitations was Virginia Code of Professional Responsibility Disciplinary Rule 7-103, which prohibits attorneys from communicating with opposing parties except through opposing counsel. Circuit City complains that this limitation effectively barred Circuit City from communicating with African-American employees who wished to contradict the Plaintiffs' assertions, including employees who wanted to initiate the communication.

Although the district court's order limited *ex parte* communications between Circuit City and its African-American employees at HQ, the order also indicated that, if Circuit City wished to communicate with class members outside the given limitations, Circuit City could apply to the district court for permission to do so. Circuit City merely had to justify why the communication should be exempt from Rule 7-103. The record shows that Circuit City made several such motions, and that the district court readily granted the motions when Circuit City explained why it was necessary to do so. The district court did not, however, grant those motions when Circuit City failed to outline a sufficiently important need for an exception to Rule 7-103.

Circuit City points to no particular denial it alleges was erroneous, nor to any particular employee with whom it needed to communicate in order to establish an effective defense. Rather, Circuit City merely complains it was prohibited from communicating with any employee it wished. If there were employees with whom Circuit City needed to communicate, the procedures were available for Circuit City to gain permission to do so. The fact that Circuit City failed to utilize those procedures does

not mean that the district court's limitations on *ex parte* communications precluded Circuit City from establishing an effective defense. Furthermore, because Circuit City has failed to identify any prejudice which resulted from the district court's limitations on communications, any error in imposing those limitations was harmless.

B

Circuit City also claims it was precluded from establishing an effective defense because the district court refused to compel the discovery of certain information used by Plaintiffs' statistical expert, Dr. Harless. Circuit City wished to review the methods, data, sources, computer programs, data runs, and codes that Dr. Harless used in performing his statistical analysis of Circuit City's promotion decisions. In response to Circuit City's motion to compel disclosure of this information, the Plaintiffs demonstrated that the data runs, computer programs and codes used by Dr. Harless were produced and developed by other non-testifying consultants retained by the Plaintiffs. Because Circuit City did not demonstrate exceptional circumstances, the district court denied Circuit City's motion to compel discovery of this information. We hold that the district court did not abuse its discretion in refusing to compel this discovery.

Federal Rule of Civil Procedure 26(b) allows discovery of information held by non-testifying experts only upon a "showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P. 26(b)(4)(B). Circuit City directs us to no place in the record where it made such a showing and, in any event, the record demonstrates that Circuit City was able to obtain sufficient information by other means. Harless submitted a detailed expert report as required by the rules, setting forth each of his opinions and providing supporting reasons and exhibits. Circuit

City was able to thoroughly examine Harless during his deposition about the bases of, and the methods used for, his analysis. In addition, Circuit City's statistical experts, Drs. Haworth and Kolesar, examined and refuted Dr. Harless' analysis. Given these facts, we cannot conclude the district court abused its "substantial discretion in managing discovery" by denying Circuit City access to this information. *See Lone Star Steakhouse*, 43 F.3d at 929.

In summary, we hold that the district court's limitations on communication with class members[8] and its refusal to compel discovery of Dr. Harless' data runs, computer programs, codes, etc., did not preclude Circuit City from establishing an effective defense.

V

Circuit City next argues that the district court erred in submitting the issue of punitive damages to the jury. We agree.

A plaintiff who brings a successful action under 42 U.S.C. § 1981 is entitled to equitable relief, compensatory damages and, "under certain circumstances," punitive damages.[9] *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (citing *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975)). However, not every action under § 1981 warrants an award of punitive damages. *See id.* Punitive damages are only recoverable for conduct exhibiting "malice, an evil motive, or recklessness or callous indifference to a federally protected right." *Id.* (citing *Smith v. Wade*, 461 U.S. 30, 56 (1983)). It is an "extraordinary remedy," designed to punish and deter "particularly egregious conduct." *Stephens*, 848 F.2d at 489 (citing *City of New-*

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[8] The class was not decertified until the beginning of the trial.

[9] A plaintiff that successfully brings an action for violations of both § 1981 and Title VII may only recover damages under § 1981. *See* 42 U.S.C. § 1981a(a)(1).

port v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981)). "Although any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Id.* at 489-90.

In our view, there is simply insufficient evidence in the record to conclude that Circuit City's conduct toward Lowery and Peterson was so egregious that it was appropriate to submit the issue of punitive damages to the jury. The record is clear that Lowery and Peterson had problems that, at least partially, led to their being passed up for promotion. In light of this evidence, the extraordinary remedy of punitive damages was not appropriate, notwithstanding the jury's finding that Circuit City did not promote Lowery and Peterson because of their race. We conclude that the district court erred in submitting this issue to the jury and, consequently, vacate the award of punitive damages.

VI

Circuit City next complains of the injunction imposed by the district court, arguing the injunction is impermissibly over-broad. We review the district court's grant of a permanent injunction for abuse of discretion. *See Lone Star Steakhouse*, 43 F.3d at 939. As we explain below, we affirm the portions of the injunction contained in Section B that relate to Lowery. However, because we conclude that the remaining portions of the injunction inappropriately grant what amounts to class-wide relief, we hold that the district court abused its discretion in granting that relief and vacate those portions.

We have explained that the standard to be applied by the courts of this circuit in determining the appropriate remedy for racial discrimination is that the plaintiff should be placed in as near a position as possible to where he/she would have been now had the discrimination not occurred. *See Pecker v. Heckler*, 801 F.2d 709, 711 (4th Cir. 1986). Being equitable relief, an injunction should

be no broader than necessary to achieve its desired goals. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Moreover, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Id.* (citing *Yamasaki*, 442 U.S. at 702). Ordinarily, class-wide relief for disparate treatment discrimination is appropriate only where there is a properly certified class, *see Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989), although occasionally individual relief equates to class-wide relief, *see, e.g., Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925-26 (4th Cir. 1990) (directing the district court to fashion what amounted to class-wide injunctive relief in a case where an individual plaintiff proved that the employer's hiring practices had a disparate impact on minorities). For several reasons, the district court's injunction violates these principles.

First, although the district court appropriately decertified the class action, the provisions of the injunction grant class-wide remedies. The injunction requires Circuit City to promote all persons at HQ without regard to their race, and requires Circuit City to set up a Department of Diversity Management and revise its program of promoting employees. To ensure that the provisions of the injunction are carried out, it includes labyrinthine provisions for reporting and enforcement. Many aspects of the new programs are subject to Plaintiffs' approval, for which Plaintiffs' counsel may apply quarterly for fees and expenses incurred in the monitoring and enforcement of the order. Oversight by the Plaintiffs and the district court would occur for at least five years, and possibly longer if it was deemed necessary to carry out the purposes of the injunction. Such sweeping remedies far surpass those needed—and are far more burdensome than needed—to provide the prevailing Plaintiffs with complete relief.

Second, the Director of the Department of Diversity Management is required to establish a career development and mentoring program for all African-American em-

ployees. Not only is this class-wide relief, but the record clearly shows that minorities other than just African-Americans are also employed by Circuit City. Third, the district court admits that the breadth of its injunction was due to the verdict in favor of the Plaintiffs on the pattern or practice claim. Because, as we hold above, individuals may not bring a claim of pattern or practice discrimination, this "claim" cannot support an injunction which grants such broad and sweeping relief.

Fourth, the order essentially enjoins Circuit City from committing further violations of federal civil rights laws. This is the sort of go-thy-way-and-sin-no-more provision which we invalidated in *Davis v. Richmond, Fredericksburg & Potomac R.R.*, 803 F.2d 1322 (4th Cir. 1986). The district court in that case enjoined the employer from "committing further violations of Title VII." *Id.* at 1328. We held that such an injunction impermissibly subjects a defendant to contempt proceedings for conduct unlike and unrelated to the violation with which it was originally charged. *See id.*

Fifth, the injunction permanently enjoins Circuit City from taking "any adverse employment action against any African American employee." (J.A. 772). On its face, therefore, the injunction would prevent Circuit City from taking an adverse employment action against an African-American employee, even if the employee indisputably merited the adverse action and the action was undeniably nondiscriminatory.

The injunction's provisions in Section B relating to Lowery, on the other hand, are broad enough to provide her with complete relief without being overly burdensome or expansive. These provisions require Circuit City to promote Lowery to the position of Supervisor of Management Recruiting or an equivalent position, and to pay her the difference in salary between what she earned and what she would have earned had she been appropriately promoted. In other words, these provisions place Lowery in

as near a position as possible to where she would be now had the discrimination not occurred. *See Pecker*, 801 F.2d at 711. We, therefore, affirm the provisions in Section B of the injunction relating to Lowery, but vacate all other portions of the district court's injunction. We also affirm the district court's January 7, 1998 order granting Lowery's motion to compel Circuit City's compliance with Section B of the injunction and awarding Lowery her reasonable attorneys' fees and costs incurred in connection with that motion to be subsequently determined.

VII

Finally, Circuit City argued that the district court erroneously awarded in general the Plaintiffs attorneys' fees and costs. We review an award of costs and attorneys' fees for abuse of discretion. *See Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 151 (4th Cir. 1996) (citing *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988)).

Our court has recognized that the most critical factor in calculating a reasonable fee award is the degree of success obtained. *See McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (quoting *Hensley*, 461 U.S. at 436). When the plaintiffs have achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. *See id.* (quoting *Hensley*, 461 U.S. at 436).

Here, the district court justified its award of full attorneys' fees and costs on the Plaintiffs' success on their pattern or practice claim. However, because we hold above that individual plaintiffs may not bring a claim for pattern or practice discrimination, the jury's finding here cannot support a recovery of attorneys' fees for those Plaintiffs that did not otherwise succeed in this action. Furthermore, viewing the case as a whole, we conclude that the Plaintiffs in fact achieved a very low degree of success. The

Plaintiffs brought this suit as a class action, but the district court appropriately decertified the class action at the beginning of trial. The suit originally involved fifty claims filed by eleven Plaintiffs, but only fifteen claims of three Plaintiffs survived motions for dismissal, summary judgment and judgment as a matter of law. Of the fifty claims filed, the Plaintiffs prevailed on only three. In all, the Plaintiffs recovered only $16,700 in compensatory damages.

In light of the low degree of success the Plaintiffs enjoyed, we hold that district court abused its discretion in awarding the Plaintiffs all of their accrued attorneys' fees and costs amounting to nearly $4 million. *See McDonnell*, 134 F.3d at 641. We, therefore, vacate the award of attorneys' fees and remand to the district court for redetermination in light of this opinion.

VIII

In summary, for the reasons stated above, we: (1) affirm the district court's order decertifying the class action; (2) vacate the judgment entered on the claim for pattern or practice of discrimination; (3) affirm the grant of summary judgment against N. Smith, S. Smith, and Spencer, and the grant of judgment as a matter of law against P. Smith, Fleming and Stokes; (4) affirm the verdicts in favor of Lowery and Peterson; (5) vacate the award of punitive damages; (6) affirm the provisions of the injunction relating to Lowery in Section B, but vacate all other provisions; (7) affirm the district court's grant of Lowery's motion to compel compliance with Section B of the injunction and award of reasonable attorneys' fees and costs in connection with that motion; and (8) vacate the general award of attorneys' fees and costs, and remand with instructions to redetermine costs and fees in a manner consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

[Filed October 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1372 CA-95-964

LOWERY v. CIRCUIT CITY STORES

No. 97-1470 CA-95-964

MCKNIGHT v. CIRCUIT CITY STORES

No. 97-1917 CA-95-964

MCKNIGHT v. CIRCUIT CITY STORES

No. 98-1170 CA-95-964

LOWERY v. CIRCUIT CITY STORES

MANDATE

The judgment of this Court dated 9/14/98 takes effect today.

PATRICIA S. CONNOR
CLERK

APPENDIX C

[Filed Jun. 25, 1997]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Civil Action Number 3:95C-964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on a motion by defendant Circuit City Stores, Inc. ("Circuit City") for a stay of this Court's injunctive relief Order entered on March 12, 1997 ("Injunctive Order"). Circuit City moves for this stay pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, and asks this Court to suspend the Order pending appeal. In the alternative, if the Court denies this motion, Circuit City requests that the Court issue a temporary stay "until the Fourth Circuit has had an opportunity to rule on the emergency stay motion that Circuit City intends to file within 24 hours of any adverse decision by this Court." Circuit City also petitions the Court to stay the Injunctive Order as it relates specifically to Renee Lowery. For the reasons stated herein, the Court will DENY Circuit City's motion for a stay of the Injunctive Order in its entirety and as it relates to Renee

Lowery. Additionally, the Court will DENY Circuit City's request for a temporary stay pending the appeal of the instant Order denying its motion for a stay.

BACKGROUND

On December 2, 1996, after a month-long trial, the jury in this case returned a unanimous verdict finding that (1) Circuit City engaged in a pattern or practice of race discrimination; (2) Circuit City wrongfully denied plaintiff Renee Lowery a promotion to the position of Management Recruiting Supervisor in October 1994; and (3) Circuit City wrongfully denied Lisa Peterson promotions to Assistant Supervisor positions in November 1994 and December 1994. The jury awarded Ms. Peterson and Ms. Lowery $288,700 in compensatory and punitive damages. And on March 12, 1997, after the issue was fully briefed and the parties were heard, the Court entered a permanent injunction enjoining Circuit City from further discrimination and ordering it to create a promotion structure targeted at preventing further racial discrimination at the company.

On March 17, 1997, Circuit City filed a notice of appeal and a motion requesting the Court to enter a stay of its Injunctive Order pending appeal. On March 19, 1997, the Court, without ruling on Circuit City's motion for a permanent stay, entered a temporary stay of the Injunctive Order.

In short, Circuit City argues that the Court should stay its Injunctive Order pending appeal for the following reasons: (1) there is a strong likelihood that the novel legal questions at issue in an appeal could be resolved in favor of Circuit City; (2) the broad injunction ordered by the Court will irreparably harm Circuit City and its employees if enforced before the Court of Appeals rules on the issues presented; (3) a stay will not substantially harm the parties to this litigation; and (4) a balancing of public interests favors neither party.

As expected, plaintiffs respond that a stay is unwarranted in this case because (1) Circuit City is not likely to prevail on appeal; (2) Circuit City will not be irreparably injured by compliance with the Injunctive Order during the pendency of the appeal; (3) if a stay is granted, plaintiffs and hundreds of other African American employees at Headquarters are likely to suffer significant injury; and (4) a stay would be contrary to the public interest. As the motion is fully briefed by the parties, it is now ripe for decision.

ANALYSIS

Standard of Review

Rule 62(c) of the Federal Rules of Civil Procedure allows the trial court, in its discretion, to suspend an injunction during the pendency of an appeal. Circuit City and the plaintiffs agree that Circuit City is entitled to a stay only if it shows that: (1) it will likely prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay is denied; (3) other parties will not be substantially harmed by the stay; and (4) the public interest will be served by granting the stay. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). However, the parties disagree as to the standard which the Court should apply in weighing these factors.

On the one hand, Circuit City urges use of a balancing test. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977). That is, the Court would weigh the above factors, and if, on balance, the factors favor Circuit City, then the stay would be granted. Of course, the opposite is true as well. If, on balance, the factors favor the plaintiffs, then the Court would deny the stay. On the other hand, the plaintiffs urge the Court to a "strong showing" standard whereby Circuit City would need to make a strong showing as to *each* of the four factors in order for the Court to grant a stay.

After a review of the case law in this circuit, it seems that Circuit City has the best of this argument. As the Fourth Circuit explained in *Blackwelder, Long v. Robinson* was a "strong showing" case which "involved a stay-pending-appeal situation, in which the district court had *fully considered the merits of the controversy,* rendered its final decree, and refused the request for an interim stay." 550 F.2d at 194 (emhasis in original). The court went on to explain that a petitioner's burden in seeking injunctive relief is substantially greater on appeal than at the trial court level. *Id.* The *Blackwelder* court essentially concluded that the "strong showing" standard is an appellate standard which is inappropriate for use at the trial court level. *Id.*

Therefore, the Court finds that a balancing test is the most appropriate approach for deciding the instant motion to stay this Court's Injunctive Order.

The Likelihood Of Success

In support of its argument that it will likely prevail on the merits of the appeal, Circuit City puts forth two major contentions. First, it advances that "the propriety of this Court entering an across-the-board injunctive remedy specifically designed to benefit non-parties in the absence of a certified class action is a novel question in this Circuit." Second, it asserts that the jury should not have been permitted to make a pattern or practice finding in the absence of a certified class action.

At the outset, the Court disagrees with Circuit City's characterization of its Injunctive Order. It is not "specifically designed to benefit non-parties." Rather, the injunction is designed to remedy intentional racial discriminatory promotion practices at Circuit City Headquarters which were directed at the plaintiffs in this case, as found unanimously by a jury of eight persons in this case. The fact that the Injunctive Order has a positive impact on non-parties as well as the parties to this case is merely incidental.

Addressing Circuit City's first complaint, as the plaintiffs point out, the Fourth Circuit has approved of systemwide injunctive relief in a variety of discrimination cases, including cases in which there was no certified class. For example, even where a named plaintiff in a non-class action suit lost on her individual claim, the Fourth Circuit held that the district court should have entered systemwide injunctive relief. *Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990). This is because even though the plaintiff could not prove that she was individually discriminated against, she was able to prove that the employer was guilty of practices violating Title VII. *Id.* The Fourth Circuit noted the following:

> The fact that Thomas did not bring a class action is of no moment. In *Sanford v. R.L. Coleman Realty Co.*, 573 F.2d 173 (4th Cir. 1978), we held that it was unnecessary for an individual plaintiff, who is entitled to equitable relief, to amend the complaint to allege a class action in order to obtain an injunction against racial discrimination, saying:
>
> > This is so because the settled rule is that "whether plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant, but all other persons subject to the practice or rule under attack."

915 F.2d at 925 (citation omitted). The *Sandford* court further stated that "[s]ince the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action, class certification was unnecessary in order to give the plaintiffs the injunctive relief they requested through class certification, assuming the facts of the case were sufficiently flagrant to support that relief." 573 F.2d at 178 (footnote omitted).

Thomas was decided in the context of a finding of disparate impact. However, the reasoning is equally applica-

ble in a case such as this one where the jury has found disparate treatment in the promotion practice at Circuit City Headquarters. The facts regarding Circuit City's promotion practices are sufficiently flagrant to support system-wide relief. Therefore, the plaintiffs in this case are entitled to injunctive relief as individuals without regard to whether there is a certified class or not.

In another Fourth Circuit case in which the individual plaintiff was unsuccessful, the court held that injunctive relief was still warranted. *Evans v. Harnett County Board of Education,* 684 F.2d 304, 306 (4th Cir. 1982). The Court stated the following:

> We cannot accept the board's contention that injunctive relief is barred because Evans neither certified this suit as a class action nor advanced a meritorious individual claim. An injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class. Nor is an injunction against discriminatory employment practices rendered inappropriate because the court dismissed Evans's claims. . . .

Id.

Thus, this Court's Injunctive Order is not contrary to the above-cited Fourth Circuit cases. In fact, because the Court's Injunctive Order is based on the jury's verdict in favor of Ms. Lowery and Ms. Peterson in addition to its finding of a pattern or practice of discrimination at Circuit City Headquarters, it stands on even stronger ground. If the Court of Appeals allows broad injunctive relief to be granted when the individual plaintiff fails on all of her claims, certainly it is proper to enter an injunction in response to plaintiffs who were successful on their individual claims as well as a pattern and practice claim. The bottom line is that the jury properly found that Circuit City's promotion practices violate Title VII in that

they unlawfully constitute intentional racial discrimination, and injunctive relief is an appropriate remedy under the law. The Court acknowledges that it decertified the class in this case for efficiency and fairness reasons. However, nothing in the precedent set by the Fourth Circuit precludes the Court's actions under these circumstances. Therefore, the Court concludes that the probability of success on appeal is not substantial based on Circuit City's argument that the injunction should not have been granted in the absence of class certification.

Likewise, in reviewing Circuit City's second contention that the pattern or practice claim should not have been presented to the jury absent class certification, the Court finds Circuit City's probability of success on appeal insubstantial. It is true that the Fourth Circuit has not expressly held that a pattern and practice claim may be tried by individual plaintiffs. However, none of the precedents set by the Fourth Circuit or the Supreme Court indicate that it is improper to do so.

The Court is in agreement with the plaintiffs. The rationale of *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), has no application here. *Stastny* did not hold that a pattern or practice claim may only be tried in a class action suit. This was not even an issue in the case. Even the most broad reading of *Stastny* indicates that the court simply held that the class should have been decertified at the conclusion of the trial because the plaintiffs had failed to establish the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 276. Thus, the only reason that the separate pattern or practice claim could not go forward in *Stastny* is because of the failure to find sufficient commonality among the plaintiffs.

However, as this Court noted in its March 12, 1997 Memorandum Opinion denying Circuit City's motion for judgment notwithstanding the verdict, this Court found that

plaintiffs had shown sufficient commonality under Rule 23 to warrant class certification. When the Court decertified the class, it was only because of efficiency problems and fairness issues. The Court never reversed its finding of commonality among the plaintiffs in this action. Thus, even if *Stastny* is controlling in this instance, it is inapplicable to this case.

For these reasons, the Court concludes that Circuit City has failed to show that its probability of success on appeal is substantial.

The Harm Absent A Stay

Next, Circuit City argues, without the support of affidavits, that the "sweeping nature of the injunction ordered by the Court will irreparably harm [its] business operations, as well as [its] employees" if the stay is denied. Specifically, Circuit City contends that it will lose its competitive edge in the retail industry if it is required to immediately "revamp" its promotions process. This is allegedly because no company in Circuit City's retail market has adopted practices resembling those in this Court's Injunctive Order. Circuit City maintains that the "bureaucratic guidelines" required by the Injunctive Order have the potential to paralyze the promotion process and further limit Circuit City's ability to remain competitive.

Further, Circuit City asserts that its competitive position will be hampered because of what it calls a "bifurcated promotion system." This terminology refers to the fact that the Injunctive Order is directed only toward Circuit City's Headquarters, which makes up only 10 percent of its nationwide workforce. The remaining 90 percent of the workforce is unaffected by the Court's injunction. This argument is specious. Circuit City has maintained, throughout these proceedings that hiring at Headquarters is entirely separate from hiring in its numerous stores nationwide. The Court finds it incredible

that an adjustment to rid the company of its racial discriminatory promotion practices in 10 percent of its multi-billion dollar company will make the whole house of cards fall down. The Court is especially incredulous of this argument because the promotion practices at Headquarters are independent of those in the rest of the corporation.

The Court admits that implementation of the Injunctive Order will come at some cost to Circuit City. However, the Court does not accept the representation that the creation of non-discriminatory promotion practices will cause an enormous amount of irreparable damage to Circuit City. And, as the Court in *Long* stated,

> I do not minimize the cost, the inconvenience or the burdens which will be placed upon the defendants should they begin compliance with the order. However, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."

432 F.2d at 980 (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Additionally, Circuit City raises the notion that the Court's Injunctive Order imposes requirements which are equally as rigid and bureaucratic as the racial quotas in the injunction rejected by the Fourth Circuit in *Sledge v. J.P. Stevens & Co.*, 1976 WL 3791 (4th Cir. Sept. 30, 1976). Circuit City concludes that the Court's Injunctive Order amounts to a race-based guarantee of favorable treatment. The Court recognizes Circuit City's continued inability to accept the fact that a jury properly found that it discriminates based on race in its promotion procedures at its Headquarters. However, a proper finding of discrimination does not operate in a vacuum; there must also be a remedy. And Title VII provides for injunctive relief as a remedy.

Contrary to Circuit City's protestations, the Injunctive Order is not rigid, bureaucratic or a race-based guarantee

of favorable treatment. The injunction orders Circuit City to treat African Americans, not favorably, but equally in the promotion process at Headquarters. The procedures to be followed to eliminate the racial discrimination at Circuit City are well supported by the evidence at trial and the testimony of experts regarding the best methods used by most competitive companies to ensure racial equity in the promotion process. In essence, the Injunctive Order eradicates Circuit City's present overly-subjective and discriminatory promotion procedures and replaces them with objective, race-neutral procedures to be used in all promotions at Headquarters.

In sum, the Court's Injunctive Order merely requires Circuit City to comply with the law. As the plaintiffs highlight, it requires Circuit City to do little more than other companies complying with the law are presently doing. Hence, Circuit City has failed to persuade the Court that it will suffer any irreparable injury if the stay is denied.

The Harm If A Stay Is Granted

With regard to the third, *Long* factor, Circuit City claims that the plaintiffs will not be harmed by a stay of the Injunctive Order. It first explains that because Ms. Peterson is no longer employed by Circuit City, the injunction has no impact on her. This argument makes sense. But what the Court does not understand is how Circuit City can argue that a stay of the Injunctive Order will not adversely affect Ms. Lowery, who still works for Circuit City.

Ms. Lowery is an African American employee at Circuit City who has been found to have been illegally discriminated against based on her race. Ms. Lowery has the right to be free from intentional discrimination in the promotion process. Even though Ms. Lowery has received individual injunctive relief, she has a federally protected right to be free from discrimination in the promotion pro-

cess should she choose to further participate in that process during the pendency of the appeal in this case.

Additionally, the jury properly found the existence of a pattern or practice of intentional race discrimination in the promotion process at Circuit City Headquarters. The injunction, entered for the benefit of the plaintiffs in this case, has the effect of benefiting all African American employees at Headquarters who participate in the promotion process. To allow proven discrimination to continue at Circuit City any longer would be unconscionable.

Circuit City counters this argument and states that its African American employees will not be harmed if a stay is granted because it "already is under a legal obligation pursuant to the Civil Rights laws not to discriminate against any protected employee." Circuit City continues: "Moreover, any violation of those laws can be remedied through an enforcement action in the courts." These are all true statements, and the violation of those Civil Rights laws is exactly what this case has been about. A jury has already found Circuit City to have violated those laws, and the purpose of the Court's injunction is to remedy those infractions. Any further delay in correcting Circuit City's discriminatory practices will truly be harmful to the plaintiffs in this case.

The Public Interest

Circuit City maintains that there are two competing, and equally important public interests implicated by this request for a stay: (1) fostering the purposes of the Civil Rights laws through efficient enforcement and (2) limiting unnecessary judicial interference with the operation of private companies. *See, e.g., Thomas v. City of Evanston*, 636 F. Supp. 587, 590 (N.D. Ill. 1986) (recognizing the enforcement of Title VII as a public interest); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("[Title VII] was not intended to di-

minish traditional management prerogatives"). Asserting that the balance of these public interests favors neither party, Circuit City concludes that this *Long* factor has little, if any, significance in the Court's analysis.

The Court strongly disagrees. The Fourth Circuit has recognized that a party suing to enforce a federal statute is, "if only provisionally," aligned with the public interest. *Blackwelder*, 550 F.2d at 197. The plaintiffs have sued to enforce laws prohibiting employment discrimination, and notably, they were highly successful. Thus, the public interest weighs heavily in favor of plaintiffs in this case.

Even accepting the notion that "limiting the unnecessary judicial interference with the operation of private companies" is a valid public interest, the vindication of federal laws prohibiting intentional discrimination outweighs that interest. Moreover, no corporation has a "traditional management prerogative" to intentionally discriminate in the promotion process. Hence, the Court's Injunctive Order is not *unnecessarily* interfering with the operation of Circuit City Headquarters.

This Court finds it wise to follow the rationale of other courts which have denied a stay in cases involving the violation of civil rights because doing so better serves the public interest. For example, one court refused to delay implementation of injunctive relief pending appeal because it would send a message that "discriminatory employers can continually run over victims of discrimination and make a mockery of civil rights legislation." *Duke v. Uniroyal, Inc.*, 777 F. Supp. 428, 434 (E.D.N.C. 1991) (Footnote omitted). "If civil rights legislation is to have any meaning to those within its protective care, the public must have confidence in the judicial system, and discriminatory employers must learn that their conduct will not be tolerated." *Id.* Based on this reasoning, the Court must conclude that the public interest would not be served by granting a stay.

In sum, in balancing the four *Long* factors, the Court finds that the factors weigh in favor of the plaintiffs and "the public interest lies in immediate implementation of the order." 432 F.2d at 981. Therefore, the Court will deny Circuit City's motion for a stay of its Injunctive Order.

Request For A Stay As To Renee Lowery

Paragraph 5 of the Injunctive Order directs Circuit City to promote Renee Lowery to the position of Supervisor of Management Recruiting, or an equivalent position as soon as such a position becomes open at Headquarters. Until she is promoted, Circuit City must pay Ms. Lowery front pay damages, that is, the difference between her salary and benefits in her current position and the salary and benefits for the Supervisor or equivalent position.[1] Presently, the Supervisor of Management Recruiting position no longer exists and no other equivalent position is open at this time, therefore, Ms. Lowery's injunctive relief is in the form of front pay damages.

Circuit City interprets front pay as a monetary remedy and not an injunctive remedy. Based on this assumption, Circuit City argues that the Court "should treat this award as it would any monetary judgment, and grant the stay as a matter of right." However, the Court disagrees with Circuit City's assessment and finds that front pay is an equitable remedy.

In the context of a case under the Age Discrimination in Employment Act ("ADEA"), the Fourth Circuit has held that front pay is a form of equitable relief. *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir.), *cert. denied*, 502 U.S. 963, 112 S. Ct. 429 (1991). Even though this case involves Title VII, the analysis is the same. First of all, 42 U.S.C. §§ 1981a(a)(1) and 1981a (b)(2) explain that compensatory damages exclude back-

[1] Ms. Lowery's current salary is $46,000 per year. As a Supervisor, she would be paid $60,000 per year.

pay and "any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)] [Title VII]." Although section 706(g) does not mention front pay specifically, it does provide that after a finding of intentional unlawful discrimination,

> the court may enjoin the [defendant] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). Thus, reading § 1981a and section 706(g) together, the Court concludes that equitable relief cannot constitute compensatory damages. And it follows that because compensatory damages are essentially monetary damages, then equitable relief cannot constitute monetary damages. However, the reverse is not true. As the following discussion reveals, "money damages" can, in some instances, be considered equitable relief.

Now, with that framework in place, the Court turns to what the Fourth Circuit has said regarding monetary damages and front pay. "Money damages . . . are not always legal in nature; a money damages award may be a form of equitable relief if it is 'restitutionary' or incidental to or intertwined with injunctive relief." *Duke*, 928 F.2d at 1424 (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S. Ct. 1339 (1990)). In discussing the nature of front pay, the Fourth Circuit continued:

> [W]hether front pay is to be made available to a plaintiff under the ADEA is a matter left to the discretion of the trial judge who must consider a host of factors, including whether reinstatement is practical. While reinstatement, which is clearly an equitable remedy, is the much preferred remedy, front

> pay may serve as a substitute or a complement. . . . It can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment. . . . The infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages. Its award, as an adjunct or an alternative to reinstatement, must rest in the discretion of the court in shaping the appropriate remedy. Thus, as with back pay under Title VII, front pay under the ADEA has a restitutionary nature.

928 F.2d at 1424.

There can be no argument that this Court's order that Circuit City promote Ms. Lowery is equitable in nature just like the remedy of reinstatement. Further, the Court complemented that award of a promotion with the award of front pay, pending the promotion. The front pay award in this case is an alternative to the promotion and is thus "restitutionary" and "incidental to or intertwined with injunctive relief." Thus, the only rational conclusion under these circumstances, and in light of the Fourth Circuit's interpretation of these issues, is that Ms. Lowery's front pay award is equitable and not monetary in nature. Therefore, Circuit City is not entitled to a stay "as a matter of right."

Getting back to the issue at hand, a stay of Ms. Lowery's award of injunctive relief is inappropriate after a balancing of the *Long* factors. First, Circuit City has failed to show that it will likely prevail on the merits of the appeal because there is no indication that the jury erred in finding that Circuit City discriminated against Ms. Lowery by failing to promote her in 1994. Second, Circuit City will not suffer irreparable injury if the stay is denied. As one court explained in declining to issue a stay of an order to promote the plaintiff,

> Needless disruption and administrative inconvenience, however, are not the equivalent of irreparable injury. Nor are the attendant risks of litigation that may prove necessary to recoup additional wages paid Mrs. Malarkey pursuant to the judgment. . . . A corporation the size of Texaco, which presumably shifts personnel as a matter of course, will not be irreversibly injured by promoting a single, well-qualified employee.

Malarkey v. Texaco, 794 F. Supp. 1248, 1250-51 (S.D.N.Y. 1992).

Third, Ms. Lowery will be substantially harmed by the stay. As the plaintiffs indicate, Ms. Lowery has been wrongfully denied a promotion to a supervisory position for over two and one-half years, and there is no reason to further delay granting her the benefits of a promotion to which she is entitled. Furthermore, the plaintiffs correctly point out that should a position equivalent to the Supervisor of Recruitment Management position come open during the pendency of the appeal, Ms. Lowery should not be prevented by a stay from taking her rightful supervisor position. Fourth, the public interest will not be served by granting a stay because of the need to enforce federal laws prohibiting racial discrimination in employment. Therefore, on balance, the *Long* factors favor Mr. Lowery and the Court will deny Circuit City's motion for a stay of its Injunctive Order as it pertains to Ms. Lowery individually.

SUMMARY

For all of the above reasons the Court will DENY Circuit City's motion for a stay of the Injunctive Order in its entirety and as it relates to Renee Lowery individually. Additionally, the Court will DENY Circuit City's request for a temporary stay pending the appeal of the instant Order denying its motion for a stay. Accordingly, the Court will VACATE its Order dated March 19, 1997 granting a temporary stay of the Injunctive Order.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: June 25, 1997

APPENDIX D

[Filed Mar. 12, 1997]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on Circuit City's motion for judgment notwithstanding the verdict, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons stated herein, Circuit City's motion is denied and the judgment shall stand.

BACKGROUND

Plaintiffs filed this suit alleging race discrimination in the promotion process at Circuit City's Headquarters in Richmond, Virginia. After a month-long trial, the jury returned a unanimous verdict finding that (1) Circuit City engaged in a pattern or practice of race discrimination; (2) Circuit City wrongfully denied plaintiff Renee Lowery a promotion to the position of Management Recruiting Supervisor in October 1994; and (3) Circuit City wrongfully denied Lisa Peterson promotions to Assistant Super-

visor positions in November 1994 and December 1994. The jury found that Circuit City did not discriminate as to 12 other specific claims of discrimination presented to them.

Circuit City now moves for judgment as a matter of law, claiming that there is insufficient evidence to support the jury's finding of a pattern or practice of race discrimination and discrimination against Lowery and Peterson.

ANALYSIS

I. *Standard of Review*

On a motion for judgment notwithstanding the verdict, pursuant to Rule 50(b), the Court may only overturn the jury's verdict if there is no legally sufficient evidentiary basis for a reasonable jury to have found for the prevailing party. *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir.), *cert. denied*, 506 U.S. 872, 113 S. Ct. 206 (1992). However, a mere scintilla of evidence is insufficient to sustain a verdict. *Lust v. Clark Equipment Co.*, 792 F.2d 436, 437 (4th Cir. 1986). In making this determination, the Court cannot weigh the evidence or assess the credibility of witnesses. *Anheuser-Busch*, 962 F.2d at 318. Instead, the Court must view the evidence in the light most favorable to the non-moving party and draw legitimate inferences in its favor. *Id.*

II. *Pattern or Practice Claim*

A. *Viability as a Separate Claim*

Circuit City contends that because the Court decertified the class in this suit, the pattern or practice question was improperly submitted to the jury. Asserting that a jury can only decide a claim of pattern or practice in a certified class action or a suit brought by the Equal Employment Opportunity Commission, Circuit City urges the Court to reverse the jury's finding that Circuit City

engages in a pattern or practice of race discrimination. According to Circuit City, the Fourth Circuit's decision in *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), directly supports this argument.

In reality, while discussing the difficulty of making a class action determination in advance of trial, the *Stastny* court emphasized the intertwining of the class action inquiry with the inquiry into the merits of the case. The court explained that the process of determining the propriety of a class action necessarily depends upon answering the substantive question whether there exists a pattern or practice sufficiently and comparably affecting an identifiable class of protected employees. *Id.* at 274. Based on the finding that the plaintiff had not met the class certification requirements of Rule 23, the court held that the trial court should have withdrawn the class action and stricken the class allegations. *Id.* at 276.

According to Circuit City's skewed interpretation of *Stastny*, two fundamental principles exist: "(1) class decertification resolves the merits inquiry of a pattern and practice 'claim' and (2) a pattern and practice 'claim' is the substantive counterpart to a class action and, therefore, cannot exist as a separate 'claim' in a suit involving only individual claims of discrimination." The Court agrees with plaintiffs when they assert that *Stastny* fails to support either of these propositions.

Although seemingly correct, Circuit City's impression of the *Stastny* court's conclusions leaves out an important step in the court's analysis. Crucial to the court's holdings is the finding that the plaintiff did not show the commonality required for class action treatment. *See id.* at 278. Thus, a more accurate reading of the Fourth Circuit's opinion is that when a putative class does not meet the requirements of Rule 23, class certification should be denied, and it is improper to allow the continued prosecution of a separate pattern or practice claim.

Thus, it appears that the Fourth Circuit has not decided the precise question raised by Circuit City. However, this Court's decision to decertify the class in this case and submit to the jury the plaintiffs' pattern or practice claim falls well within the guidelines of the *Stastny* opinion. The Fourth Circuit has held that the use of subjective criteria in employment practices can provide a common link among class members. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S. Ct. 2154 (1984). Contrary to Circuit City's bold assertion, this Court never "concluded that there was insufficient commonality under Rule 23 to warrant class certification and a trial on plaintiffs' allegations of class-wide discrimination in promotions." In its class certification order, this Court determined that in conjunction with statistical data, "the managers' and supervisors' subjective decision making procedures comprise a common discriminatory link among the putative class members." Concluding that all other Rule 23 requirements were satisfied, the Court conditionally certified plaintiffs' class.

Following a motion by plaintiffs to sever and bifurcate the jury trial, the Court decertified the class. In the Court's own words, "the efficiency problems, combined with the unfairness issues, [led] the Court to determine that the class action procedure is not the best method of case management." Thus, the only reason the Court decertified the class was because the benefits of class certification, *i.e.*, accelerated and efficient disposition, would not be met by continuing to try the case as a class action. The Court has never found that the class fails to satisfy any of the Rule 23 requirements. Decertification merely for case management purposes does not remove the fact that a group of individuals who qualify for class treatment are entitled to class-wide relief.

Therefore, although the case was not tried as a "typical" bifurcated class action discrimination suit, plaintiffs were still entitled to prosecute the class-wide pattern or practice

claim of disparate treatment on behalf of other similarly situated individuals who would later be entitled to bring their own individual claims into the justice system. Hence, the pattern or practice question was properly presented to the jury.

B. *Sufficiency of the Evidence to Support a Pattern or Practice Finding*

Next, Circuit City argues that even if the pattern or practice question was properly submitted to the jury, the evidence in the record is legally insufficient to support the jury's verdict. A pattern or practice claim of race discrimination requires a plaintiff "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). By a preponderance of the evidence, the plaintiff must establish "that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.*

1. Statistical Evidence

First, Circuit City attacks the sufficiency of the statistical evidence presented at trial. Circuit City argues that all of the trial evidence established that the promotion practices at Circuit City are decentralized. Thus, Circuit City continues, plaintiffs' expert, Dr. Harless, failed to show any legally significant discrimination because he aggregated all of the promotions to be examined.

To support its contention, Circuit City quotes from the *Stastny* court's class certification discussion: ". . . statistical proof designed to show disparity must be fairly adapted to the actual labor pools, work categories and like groupings of persons within which a discriminatory employment practice is alleged to have occurred." 628 F.2d at 274. In *Stastny*, the Fourth Circuit reversed a class certification, saying that the "locus of autonomy" in

making the challenged employment decisions was a "critical factor" in determining whether the commonality requirement was met. *Id.* at 279. It should be noted that the discussion involved multiple facilities and whether there should be state-wide class certification rather than class certification for a single facility. The evidence pointed to a substantial degree of local autonomy and separate labor pools for each facility. *Id.* Thus, the court rejected the state-wide statistical data because it was not broken down by facility and any discrimination inferable from the statistics could have come from a portion of the facilities and not all of them. *Id.* at 279-80.

As shown by the evidence, plaintiffs' case is different from the one presented in *Stastny*. Plaintiffs challenge the promotion practices of Circuit City Headquarters—a single unit—and not multiple facilities of Circuit City. Further, Headquarters operates as a single unit: management trainees rotate through different departments; inter-departmental transfers occur; and, the same Human Resources department services all departments and managers. As this Court pointed out in its Memorandum Opinion dated December 3, 1996, Kate Powis testified that all employees, both African American and Caucasian, are hired into a common labor pool, and they are all equally qualified.[1] Thus, an aggregated group of candidates from

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[1] Circuit City states that Kate Powis never said this. However, it admits that Marie Colvin agreed that African American and Caucasian employees at FNANB are equally competent, otherwise, they would never have been hired. Circuit City urges that this statement is limited to FNANB.

Plaintiffs point out that Kate Powis acknowledged that Circuit City's policy is to develop its employees for upward mobility and to promote from within. There is nothing in the record to indicate that these policies are limited to FNANB which, after all, is under the Circuit City Headquarters umbrella.

As plaintiffs argue, Circuit City did not and could not contend that the African Americans it hired into entry level positions at Headquarters were less qualified as a group than white entry level hires. Accordingly, the company's policy of training and promoting

Headquarters is a suitable labor pool from which to conduct statistical analysis of Circuit City's promotion rate of African Americans into supervisory positions.

After faulting Dr. Harless' method of conducting his statistical studies, Circuit City proclaims that Dr. Harless' results are legally insufficient. Central to this argument are the results of Circuit City's own expert, Dr. Haworth, who testified that no pattern or practice of discrimination in promotions existed at Circuit City. The argument is based on the fact that her statistical evidence was modeled after the actual promotion process at Circuit City, whereas, Dr. Harless' study was not. Dr. Haworth performed her analysis department by department, and then aggregated her results for the six "divisions" at Headquarters. Touting the fact that 17 African American employees who testified at trial received at least 34 promotions among them over the relevant time period, Circuit City advances that the three instances of discrimination found by the jury are "isolated." Therefore, Circuit City concludes, the jury could not have reasonably concluded from this evidence that a pattern or practice of discrimination in promotions exists at Circuit City.

In response, plaintiffs highlight that the regression analyses that Dr. Harless conducted produced standard deviations of close to 7.2, even when he changed the independent variables each time. Additionally, plaintiffs note that statistical evidence proffered by Circuit City could have also been the basis of the jury's finding of a pattern or practice of discrimination. Specifically, in his rebuttal report, Dr. Harless aggregated Dr. Haworth's results for the six Headquarters divisions and found that the promotion rates differed by 4.5 standard deviations. Although courts "should be extremely cautious in drawing any con-

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from within should have resulted in comparable promotion rates between the two groups. Thus, based on this evidence, it is reasonable for a jury to have concluded that there is a pattern and practice of race discrimination at Circuit City Headquarters.

clusions [of legal significance] from standard deviations in the range of one to three," a statistical analysis "with standard deviations of more than three" could safely be used . . . absolutely to confirm" an inference of some "disparity." *E.E.O.C. v. Federal Reserve Bank of Richmond,* 698 F.2d 633, 648 (4th Cir. 1983), *rev'd on other grounds,* 467 U.S. 867, 104 S. Ct. 2794 (1984) (quoting *E.E.O.C. v. American Nat'l Bank,* 652 F.2d 1176, 1192 (4th Cir. 1981), *cert. denied,* 459 U.S. 923, 103 S. Ct. 235 (1982)). Hence, Dr. Harless' rebuttal evidence in addition to his direct evidence is legally significant.

Through their experts, both plaintiffs and Circuit City presented legally significant evidence to the jury. Jurors are not obliged to disregard the evidence propounded by plaintiffs simply because Circuit City believes that its statistical methods are better, or because it attempted to discredit plaintiffs' statistical evidence. As fact finders, the jurors are entitled to give the evidence the weight they think it deserves. Seemingly, the jurors gave more weight to the plaintiffs' direct and rebuttal evidence than they gave to Circuit City's statistical evidence, and they cannot be faulted for reaching this conclusion.

In sum, the Court finds that Dr. Harless' studies and reports provided a legally sufficient basis for the jury to find a pattern or practice of discrimination at Circuit City's Headquarters. Further, the jury reasonably accepted plaintiffs' statistical evidence over the statistical evidence offered by Circuit City.

2. Other Evidence

Moving on, Circuit City contends that even assuming that plaintiffs' statistical evidence is legally sufficient, statistics alone, when disputed, are insufficient to show that discrimination is the Circuit City's standard operating procedure. In fact, a prima facie showing of discrimination

may be made out by statistics alone, or "by a cumulation of evidence, including statistics, patterns, practices, general policies or specific instances of discrimination." *Federal Reserve Bank of Richmond*, 698 F.2d at 645 (citations omitted). Therefore, the error in Circuit City's argument lies in the fact that plaintiffs presented much more than statistical evidence to prove their case.

Circuit City maintains that all of the testimony from the anecdotal witnesses presented at trial was legally insufficient because they could not meet the *McDonnell Douglas* test by showing that they were qualified for the promotion at issue and passed over in favor of a less qualified similarly situated Caucasian. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817 (1973).[2] Further, the testimony of these witnesses, according to Circuit City, failed to provide sufficient evidence to rebut as pretext the evidence offered by Circuit City of legitimate, nondiscriminatory reasons for the challenged decisions.

On these points, the Court disagrees with Circuit City. Each of the anecdotal witnesses proved a prima facie case of discrimination and the entire record is replete with evidence of pretext. As evidence of pretext, witnesses throughout the trial produced evidence of the subjective decisionmaking process, failure to post job openings in a uniform manner, hand-picking the employees for promotions, racially derogatory remarks, and numerous other instances of discrimination. Based on all of this evidence, the Court finds that the evidence presented by the anecdotal witnesses satisfies the *McDonnell Douglas* test.

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[2] An individual proves a prima facie case by showing that he or she (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. 411 U.S. 802, 93 S. Ct. 1824.

The Court will not begin to recount the seemingly endless footnotes regarding the anecdotal witnesses who allegedly failed to meet their burden to prove their own discrimination. Plaintiffs deftly respond to each of Circuit City's recitations regarding the failure on the part of these witnesses. Underlying each of Circuit City's contentions is a jury question. Many of the "legitimate business reasons" articulated by Circuit City were that the witness was not discriminated against or that he or she was not qualified for the supervisory position. The jury was not bound to accept this testimony. In many cases, these reasons were relayed by a person in management with no objective, documentary evidence to support the assertion. Additionally, the circumstances surrounding each denial of a promotion related, among other factors, to the excessive subjectivity in the promotion process, the lack of a uniform system for posting job openings, allegations of racial remarks by those in management, or the time at [sic] the witness began to receive negative performance reviews.

In addition to the evidence of pretext and witness testimony outlined above, plaintiffs presented other evidence which indicated a pattern or practice of discrimination or pretext as to Circuit City's explanations for its actions. For instance, there was evidence that Circuit City does not monitor promotions to guarantee that discrimination does not play a role in the decision-making process. Additionally, many witnesses testified that they did not use any of Circuit City's avenues designed to encourage employees to bring forth discrimination problems because of fear of retaliation. Further, there was evidence that Circuit City failed to respond to complaints of discrimination concerning promotions. Also in the evidence was the Booth Report. which Circuit City made no attempt to respond to. Finally, the jury was aware that plaintiffs only discovered the existence of the Cook Report shortly before trial and only through one of their own anecdotal witnesses. Certainly the jury cannot be faulted and was reasonable in

accepting any or all of these factors as pretext for Circuit City's presumably legitimate non-discriminatory reasons for its employment decisions.

Circuit City attempts to invade the province of the jury to balance the weight of the facts and to assess the credibility of witnesses. However, the Court cannot do so in a motion for judgment notwithstanding the verdict. The jury was entitled to accept all of the evidence presented by plaintiffs and to reject as pretext Circuit City's proffered nondiscriminatory reasons for its employment decisions. Hence, the Court finds that the jury was reasonable in finding a pattern or practice of discrimination based on the statistical evidence, the anecdotal evidence, and other evidence presented at trial and will allow the judgment to stand on that basis.

III. *Individual Claims*

Plaintiffs' claims of individual discriminatory treatment must be analyzed under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and its progeny. Under this analytical framework, plaintiffs must first establish a prima facie case of discrimination. An individual proves a prima facie case by showing that he or she (1) belongs to a racial minority, (2) applied and was qualified for a vacant position the employer was attempting to fill, (3) was rejected for the position, and (4) after his rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. *Id.* at 802, 93 S. Ct. at 1824.

If a plaintiff succeeds in establishing a prima facie case, Circuit City may rebut the presumption of discriminatory intent by articulating legitimate nondiscriminatory business reasons for the challenged actions. The ultimate burden of persuasion remains with plaintiffs throughout the *McDonnell Douglas* process. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). If plain-

tiffs can prove that the reasons offered by Circuit City are not the true reasons, but instead, actually are pretext for discrimination, plaintiffs may prevail on their claims of disparate treatment. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981). To prove pretext, plaintiffs must demonstrate "both the reason [articulated by the employer] was false, and that discrimination was the real reason [for the challenged action]." *Hicks*, 113 S. Ct. at 2752.

The Supreme Court, in *Teamsters*, explained that the *McDonnell Douglas* test is not the only way in which a plaintiff can establish a prima facie case of individual discrimination. 431 U.S. at 358, 97 S. Ct. at 1866. "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Id.* (footnote omitted). The plaintiff's initial burden of proof can also be met by demonstrating the existence of a discriminatory hiring pattern and practice. *See Id.* at 359, 97 S. Ct. at 1867; *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S. Ct. 1251, 1268 (1976). After plaintiff establishes the prima facie case, then the employer is required to come forth with a nondiscriminatory justification for the employment action and plaintiff must then submit evidence that the employer's proffered reasons are pretext for unlawful discrimination. *Teamsters*, 431 U.S. at 362 n. 50, 97 S. Ct. at 1868 n.50.

A. *Renee Lowery*

Circuit City contends that the record is devoid of any evidence that could establish that the decision to promote Paige Bell instead of Renee Lowery to Supervisor of Man-

agement Recruitment was caused by race discrimination. Instead, Circuit City argues, the evidence supports the position that Bell was simply the better qualified candidate for the position. According to Circuit City, Lowery failed to meet her burden of producing any evidence of pretext by showing that Renee Lowery had the "skills that Circuit City indisputably valued for the Supervisor of Management Recruiting position."

In pointing out that Lowery presented evidence that she had more educational and prior work experience than Bell, plaintiffs maintain that Lowery succeeded in presenting evidence from which a reasonable jury could find that Circuit City discriminated against Lowery. Plaintiffs also highlight the evidence presented that indicated Lowery's outstanding performance as reflected by her Progress Conference Reports, several years of supervisory experience before becoming a recruiter, and that she had recruited for more departments than any other recruiter. The Court finds that this evidence, in conjunction with the other evidence in the record regarding Circuit City's subjective promotion practices, racial remarks, etc. is sufficient for a reasonable jury to find that Circuit City's decision to promote Bell instead of Lowery was based on discrimination.

The inherent problem with Circuit City's argument is that it bases its non-discriminatory reasons for its promotion decision on a subjective system which the jury found to be discriminatory. For example, Circuit City lists four of Bell's "credentials," which Lowery lacked, and proclaims that these were the qualifications that were valued for the Supervisor position.

Nowhere in Circuit City's promotion policy for this position does it state that a qualified applicant must have, as Bell did, "(1) one year of supervisory experience managing clerical workers at Circuit City; (2) experience as the *de facto* head of the Recruiting department for six weeks; (3) outstanding performance record contain-

ing no negative marks; and (4) unquestioned organizational and leadership skills." These "indisputably valued" skills could only have been created after Bell was hired. Instead of creating specific, objective qualifications for the position before making the hiring decision, Circuit City essentially asserts that the qualifications necessary for the Supervisor position are any qualifications that the successful candidate possesses which Lowery does not possess. From this kind of evidence a reasonable jury could properly find as pretext Circuit City's explanation that Bell was better qualified than Lowery.

B. *Lisa Peterson*

As to Lisa Peterson, Circuit City maintains that she failed to show that she was wrongly denied a promotion to Assistant Supervisor in the Customer Service Mail Department in November and December 1994. With respect to the position that was offered to Janet Whalen in November 1994, Circuit City provides two explanations for the selection of Whalen over Peterson: (1) Whalen was more qualified, and (2) Peterson had already proven that she could not handle the responsibilities of the job after she assumed the role of acting Assistant Supervisor in May 1994. Plaintiffs counter these arguments by offering that although Circuit City claims that Peterson performed insufficiently as acting Assistant Supervisor in the Customer Service Mail Department, she was never removed from that position. Additionally, plaintiffs point out that Circuit City did not produce evidence that Whalen had any supervisory experience in that department or any demonstrated familiarity with the kinds of reports and monitoring expected of an Assistant Supervisor for the Customer Service Mail Department.

Harping on the fact that Peterson received a verbal coaching in August 1994, Circuit City contends that the jury had no basis in the record to conclude that its action was discriminatory. However, the point is that the jury

is entitled to weigh the facts and the credibility of witnesses. And in doing so, it is within the jury's province to conclude that Circuit City's assertion that Whalen was more experienced is untrue, and that the real reason Peterson was denied the promotion is based on discrimination. Presented with all of the evidence in the record regarding Circuit City's subjective promotion practices, a reasonable jury could have properly found pretextual Circuit City's assertions that Whalen was better qualified than Peterson.

Finally Circuit City attacks the jury's finding as to the Customer Service Assistant Supervisor position filled by Denise Ramos in December 1994. Ramos was laterally transferred from her Assistant Supervisor position in the Human Resources Department essentially because she was struggling with some of the requirements of the position and was having trouble keeping up with her duties. Circuit City argues that because the December 1994 position involved a lateral transfer and not a promotion, the jury could not properly find discrimination in the decision.

Although Circuit City makes an interesting argument, it totally misses the point. The *McDonnell Douglas* prima facie test requires the plaintiff to show that she was qualified for a vacant position the employer was attempting to fill. From any perspective, the Customer Service Assistant Supervisor position filled by Ramos was vacant and Circuit City sought to, and did indeed, fill it. Therefore, contrary to Circuit City's contentions, Peterson had a legal basis to claim discrimination as to this claim.

Furthermore, Circuit City's assertion that no jury could conclude that Peterson was more qualified for the position than Ramos fails to hold water. As plaintiffs stress, Peterson was already serving as an acting Assistant Supervisor in the Customer Service Department. On the other hand, Ramos had no prior Customer Service experience, no knowledge of the operating functions of the bank, no background in contacting customers, and no knowledge

of the computer system used. To top that off, Ramos was failing in her job as Assistant Supervisor—enough so that management transferred her out of her position. On these facts alone, a reasonable jury could have validly found that Circuit City's reasons for failing to promote Peterson to the Assistant Supervisor position were a mere pretext for discrimination.

CONCLUSION

In sum, viewing the evidence in the light most favorable to plaintiffs, the Court finds that there is sufficient evidence in the record to support the jury's verdict. For all of the reasons stated above, the judgments in favor of plaintiffs shall stand. Accordingly, the Court will DENY Circuit City's motion for judgment as a matter of law after the verdict.

An appropriate order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997.

[Filed Mar. 17, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

THIS MATTER is before the Court on Circuit City's motion for judgment notwithstanding the verdict, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons stated in the accompanying Memorandum Opinion, Circuit City's motion is hereby DENIED. Accordingly, the judgments in favor of plaintiffs shall stand.

Let the Clerk send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997.

APPENDIX E

[Filed Mar. 12, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER AND DECREE

THIS MATTER is before the Court of plaintiffs' motion requesting the Court to enter a permanent injunction against defendant Circuit City Stores, Inc. as a result of the jury's finding on December 2, 1996, that Circuit City intentionally engaged in a pattern or practice of racial discrimination as related to promotions against its former and present African American employees between April 1992 and December 1996 at its corporate headquarters in Richmond, Virginia ("headquarters"). Upon due consideration of the record in this case, the jury's verdict, plaintiff's motion and Circuit City's opposition thereto and for good cause shown, plaintiffs' motion is hereby GRANTED.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

A. GENERAL PROVISIONS

1. Defendant Circuit City Stores, Inc., its officers, employees, agents and successors ("Circuit City") are permanently enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any African American employee at Headquarters with regard to promotions because of his or her race.

2. Circuit City shall promote persons at Headquarters without regard to their race on the basis of objective, job related and racially-neutral standards using the procedures specified below. Nothing in this Order shall be construed as requiring the promotion of any African American at Headquarters to a job he or she is not qualified to perform, as determined in accordance with the standards and procedures set forth in this Order.

3. Circuit City is permanently enjoined from taking any adverse employment action against any African American employee or prior employee, including the named plaintiffs in this case and the African American witnesses who testified on plaintiffs' behalf at the trial, or from intimidating, harassing or retaliating against such persons in any way.

4. Within five (5) working days of this Order, Circuit City shall cause a copy of this Order to be given to every Circuit City officer, employee and board member at Headquarters and shall file with the Court and serve on counsel for plaintiffs a notice that such dissemination has been accomplished.

B. PROVISIONS FOR PLAINTIFF RENEE LOWERY

5. Circuit City shall immediately promote plaintiff Renee Lowery ("Lowery") to Supervisor, Management Recruiting or equivalent position. If such a position is not presently open at Headquarters, Circuit City shall

promote Lowery to such a position as soon as it becomes open and shall pay Lowery, in addition to her present salary and benefits, the difference between that salary and benefits and the present salary and benefits of a Supervisor, Management Recruiting, between December 2, 1996 and the date of her promotion to that position.

C. PROVISION FOR A DEPARTMENT OF DIVERSITY MANAGEMENT

6. Circuit City shall immediately establish the position of Director of Diversity Management ("the Director") within the Human Resources Area and shall provide such support and other resources to ensure that the incumbent of this newly developed position functions effectively to carry out the purposes of this Order. The Director shall be hired by Circuit City from outside the company within ninety (90) days of this Order. Circuit City's proposed Director and his or her hiring is subject to comment by plaintiffs and Court approval.

7. The Director shall be principally responsible for ensuring that Circuit City complies with the terms of this Order. The Director and the Vice President in charge of Human Resources shall be responsible for selecting any additional employees that may be necessary to aid the Director in carrying out the mandates of this Order.

8. Within thirty (30) days of his or her hiring, the Director shall select an outside consultant ("the Consultant") to give diversity management training to all officers, board members and supervisory employees at Headquarters. The selection of the Consultant will be subject to the approval of the Court.

9. Within ninety (90) days of selecting a diversity management consultant, the Consultant shall present a program, to be given to all supervisory employees, officers and board members at Headquarters, concerning diversity management and the methods and procedures to be used to prevent and eliminate discrimination with respect to

promotions. This program is to be submitted to plaintiffs, their counsel and human resources expert for comment prior to presentation. The program shall include, but is not limited to, information concerning "similar-to-me-error" and the "best practices" of other corporations concerning diversity management. This program shall be videotaped and shown to each newly-hired (or elevated) supervisory employee, officer and board member at Headquarters upon his or her arrival. A refresher course on diversity management shall be given by an outside consultant every two (2) years to all supervisory employees, officers and board members at Headquarters during the pendency of this Order.

D. PROVISIONS FOR A REVISED PROGRAM CONCERNING PROMOTIONS

10. Within ninety (90) days of his or her hiring, the Director shall file with the Court and serve on counsel for plaintiffs a proposed revised program for promotions at Headquarters ("the Program"). The Program shall include at least all of the matters set forth below. Within fifteen (15) days of the filing of the Program, counsel for plaintiffs may file an objection or other response thereto. The Court will thereafter approve, modify or reject the Program.

11. The Program shall include at least the following matters:

(a) *Common Procedures for Promotions.* The Director, in consultation with, and with the approval of, the Consultant, shall develop a common body of procedures and guidelines governing promotion selections at Circuit City Headquarters. These procedures shall be reduced to writing and communicated to all employees at Circuit City Headquarters. All promotions at Circuit City Headquarters shall be performed in accordance with these procedures and the persons selected for such promotions shall be from among candidates who have complied with the application procedures.

(b) *Job Analysis and Job-Related Criteria for Selection.* The Consultant shall conduct a job analysis of each vacant position that will identify the duties performed, the qualifications required for successful performance in the position and the job-related criteria for selection for each position. Promotion decisions shall rely upon criteria for selection that are job-related and that are drawn from the job analysis conducted periodically to ensure that the criteria used in making selections are related to successful performance in each position.

(c) *Position Descriptions.* The Director shall prepare, or oversee, the preparation of, detailed descriptions of each position at Headquarters. These descriptions shall be based upon information obtained through the job analyses of each position, as described in paragraph (b) above.

(d) *Posting of Vacancies.* All promotion vacancies shall be posted in writing and disseminated to all employees at Headquarters. These postings shall follow a common format which shall include at least the identity of the position, a description of the job, the duties of the job, the requirements for applicants and how and where applicants may apply.

(e) *Promotion Records.* All officers, managers, supervisors and other employees engaged in promoting employees at Headquarters ("the Promoters') shall make and keep written records of every promotion awarded at Headquarters ("the Promotion Records"). The Promotion Records shall include at least the name, race, and date of application for each applicant for promotion, the title and location of the position for which they applied, the stages of the promotion process through which each applicant pro-

ceeded and the name and race of the person selected for each vacancy. The Promoters shall enumerate in writing the reasons for the selection of the successful applicant and for the rejection of the unsuccessful applicants, which reasons shall be part of the Promotion Records.

(f) *Review of Promotion Recommendations.* For a period of two (2) years from the entry of this Order, no promotion decision shall be final until the Director has determined that the selection has been made on the basis of job-related and racially neutral criteria. Thereafter, Circuit City shall develop a procedure pursuant to which final promotion decisions are reviewed regularly by the Director to ensure that they are based upon job-related and racially neutral criteria.

(g) *Career Development and Mentoring.* The Director and his or her staff shall establish a career development and mentoring program for all African American employees at Headquarters. The career development program, which will include mentoring, will identify common competencies for managerial and supervisory success at Headquarters, and the behaviors which are demonstrative of meeting expectations, outstanding performance and unacceptable performance. The career development and mentoring program will be under the direction and supervision of the Director.

(h) *Monitoring and Measurement.* In addition to the review of each recommended promotion decision as stated above, the Director and his or her staff shall establish procedures to monitor the performance of all the Promoters at Headquarters and to detect whether there is a significan difference in the rate of promotions between Caucasian and similarly-situated African Amer-

ican employees every six months. Such differences in promotion rates if any, may be assessed using standard statistical measures or, where the number of promotions during the period is too small to permit a meaningful statistical analysis, any differences in promotion rates should be assessed using the rule set forth in the Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4D.

(i) *Merit Reviews.* The Director and his or her staff shall revise Circuit City's procedures for the merit reviews of its employees at Headquarters to ensure (1) that they reflect the behavior that is required for the successful performance of each job; (2) that they are anchored in observable behavior; and (3) that the Promoters are evaluated on, among other things, their success in managing a diverse work force in a racially-neutral manner.

(j) *Racial Complaints.* The Director and his or her staff shall revise Circuit City's procedures regarding complaints of racial discrimination. Those procedures shall provide that the complaining employee lodge his or her complaint directly with the Director, who shall respond personally within two (2) working days of receiving the complaint, and shall take appropriate action as soon as possible to investigate and resolve the complaint. All such complaints and responses, whether verbal or otherwise, shall be reduced to writing and included in the reports to be filed by the Director with this Court.

(k) *Training.* A new revised training component for all Promoters shall be prepared, which shall cover at least the following matters: diversity management; "similar-to-me-error"; the proper way to conduct an interview of a promotion

applicant; ways of detecting and avoiding the use of racial stereotypes in making promotion decisions; behavior that constitutes discrimination on the basis of race and retaliation; best practices of other companies in race-neutral promotion practices; the training of mentors in the career development process; and the training of African Americans to be mentored.

E. PROVISIONS FOR REPORTING AND ENFORCEMENT

12. The Court shall retain jurisdiction of this case for at least five (5) years, and thereafter for as long as shall be required to carry out the purposes of this Order.

13. In addition to the aforesaid reporting requirements, the Director shall file reports from the date of this Order with the Court and serve a copy on counsel for plaintiffs. These reports will be filed on a semi-annual basis for the first two (2) years following this Order. Thereafter, the reports will be filed on an annual basis. These reports shall include the following:

(a) The computerized employment data reported by Circuit City on its employees at Headquarters, including the same information and in the same format as produced by Circuit City before trial;

(b) A summary, by department, of all promotions granted in the preceding reporting period broken down by race;

(c) All Promotion Records;

(d) The promotion analyses conducted pursuant to the requirements of Paragraph 11 (h) above; and

(e) All complaints and responses indicating racial concerns as described above.

14. In the event plaintiffs believe that Circuit City has breached a term of this Order, they shall send a letter to the Director, with a copy to the Court, detailing the nature of the breach and the requested remedial action to be taken by Circuit City. If no satisfactory action is taken within twenty-one (21) days of Circuit City's receipt of plaintiffs' notice, plaintiffs may file a motion with the Court for the enforcement of this Order and for appropriate sanctions. Should the Director need to be replaced during the pendency of this Order due to illness, retirement, death or other reasons, Circuit City shall immediately hire a successor to the Director, whose selection shall be subject to the approval of the Court.

15. Plaintiffs' counsel may apply to the Court semi-annually for fees and expenses *reasonably* incurred in the monitoring and enforcement of this Order.

Let the Clerk send a copy of this Order and Decree to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Mar. 12, 1997

APPENDIX F

[Filed Aug. 23, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

I. Introduction

THIS MATTER is before the Court on plaintiffs' motion to sever and bifurcate the jury trial scheduled to commence on October 28, 1996. Because of fairness and efficiency considerations, the Court will DENY the motion, DECERTIFY the class, and IMPLEMENT a new trial plan.

II. Procedural History

The above-entitled action was filed as an employment discrimination class action on October 31, 1995, in the United States District Court for the District of Maryland, Southern Division, in Greenbelt, Maryland. The putative class of plaintiffs in the action is comprised of current or former employees of Circuit City Stores, Inc. ("Circuit City") who are suing for discrimination in promotion and

transfer opportunities. The amended complaint describes Circuit City's alleged discriminatory practices as:

> making personnel decisions using procedures and criteria for selection that are excessively subjective and that are used for the purpose, and have the effect, of denying opportunities for promotion and transfer to qualified [black] employees [at Circuit City's Headquarters] because of their race and that are not related to the position in question and consistent with business necessity.

Pursuant to 28 U.S.C. §1404(a), district court in Maryland transferred the case to this Court on November 29, 1995. On April 1, 1996, plaintiffs moved to certify themselves as a class, and on April 30, 1996, the Court conditionally certified the class under Federal Rule of Civil Procedure 23(b), and subsequently set the case for trial by jury, to commence on October 28, 1996. On June 13, 1996, the Court approved plaintiffs' proposed letter to all class members, informing them of the conditional class certification, the trial date, and of a toll-free telephone number they could call to speak with plaintiffs' attorneys about the case. Discovery has been ongoing and plaintiffs have filed a list of 46 non-named class members who they plan to call as trial witnesses and acknowledged the existence of perhaps 200 additional class members with claims.

III. Statement of the Case

Plaintiffs have moved for the Court to sever the issues in this action and adopt a bifurcated trial plan whereby this case would be tried in two stages. Under plaintiffs' proposed plan, in Stage I, a single jury (the "Class Jury") would resolve separate issues in three phases, with the Class Jury's decision in each phase to be followed immediately by the trial of the next phase. The Class Jury would address the following issues during the three phases of Stage I:

Phase 1: The Class Jury in this phase would address class-wide liability issues, including specifically the issue of whether defendant Circuit City Stores engaged in a class-wide pattern or practice of racial discrimination with respect to promotions and transfers at its corporate Headquarters in Richmond.

Phase 2: During this phase, the Class Jury would determine the claims for compensatory damages of the named plaintiffs, and the Court would determine whether the named plaintiffs are entitled to any equitable remedies.

Phase 3: During Phase 3, the Class Jury would determine whether Circuit City is liable to the class for punitive damages and, if so, the amount of such damages to be awarded.

At the conclusion of Stage I, the Class Jury would be discharged and, if appropriate, the Court would grant any declaratory and/or injunctive relief. If there were a finding of class-wide discrimination by the Class Jury during Stage I, then Stage II proceedings would commence. These Stage II proceedings would occur in four phases as follows:

Phase 1: Within thirty (30) days of any verdict of class-wide discrimination by the Class Jury in Stage I, a notice would be sent, at Circuit City's expense, to each member of the class, together with a questionnaire requiring a response within thirty (30) days of receipt.

Phase 2: Following receipt of the questionnaires, the parties would be permitted to conduct limited discovery concerning class members' claims. The Court would determine at a later date the amount of time to be allotted for such discovery.

Phase 3: Following completion of defendant's additional discovery of class members, the class members'

claims would be tried to a series of separate juries ("Separate Juries"), each sitting for approximately two (2) weeks, until all claims of all class members have been heard. These Separate Juries would determine whether each class member was a victim of Circuit City's allegedly discriminatory conduct and if so, the amount of compensatory damages to be awarded to that class member. The Court would determine during these separate trials whether the class member is entitled to any equitable remedies.

Phase 4: Following completion of all claims of all class members by the Separate Juries, the Court would review the total amount of all compensatory damages and backpay awarded to both the named plaintiffs and the class members in Stages I and II of the trial, and compare it with the amount of punitive damages, if any, awarded by the Class Jury in Stage I. Thereafter, the Court would award each named plaintiff and each class member receiving compensatory damages and/or backpay, a portion of the total punitive damages approved by the Court following its review. The award would be in the same proportion that each claimant's compensatory damages and/or backpay bears to the total of all compensatory damages and backpay awarded to the named plaintiffs and all class members. Should the Court conclude, following its review, that the total amount of punitive damages awarded by the Class Jury is too large to be upheld under applicable law, the Court would order a remittitur of an appropriate portion of the punitive damages before they are distributed to the claimants.

IV. Analysis

A.

Defendant has opposed the proposed trial plan, claiming that it is unconstitutional, unfair, and unmanageable.

As noted above, the Stage I/Stage II bifurcation, with separate juries at both stages, will require separate juries to reexamine evidence and issues that a prior jury has decided. Defendant first argues that the Seventh Amendment of the United States Constitution forbids reexamination when the issues before the two juries are "interwoven." Citing a recent case from the United States Court of Appeals for the Seventh Circuit, defendant avers that plaintiffs' plan fails "to carve at the joint" and unconstitutionally "divide[s] issues between separate trials in such a way that the same issue is reexamined by different juries." *In the Matter of Rhone-Poulenc Rorer, Inc.* 51 F.3d 1293, 1302-03 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) (citations omitted).

Defendant also contends that the Stage I jury could not properly assess punitive damages for the entire class rationally and fairly, an argument the Court agrees with and adopts. Plaintiffs want the Stage I jury to award punitive damages to the entire class based on evidence limited to (1) disparate treatment as to the class, and (2) actual harm and compensatory damages as to the named plaintiffs only. In other words, the first jury would make its determinations without the entire universe of information, including actual harm to the individual class members and information regarding defendant's potential legitimate non-discriminatory reasons for its allegedly adverse employment actions. This is not fair to the defendant. The essential issues of motive and intent, reprehensibility, and relationship of a class-wide punitive damages claim to proven harm would not be fully developed or decided until the contemplated Stage II trials, and could not be resolved as to the class as a whole until all those trials were complete.

Moreover Stage II anticipates the non-named class members claims being tried to a series of separate juries, sitting approximately two weeks at a time, until all the individual claims are heard. This method would prove to be no more expedient than the traditional handling of

civil cases. In addition, all of the evidence defendant may bring forth to rebut the individual claims would be relevant and admissible at plaintiffs' proposed Stage I, including Phases 1, 2, and 3. The same evidence would be relevant and admissible at the remaining separate trials in Stage II. Again, the proposal is inefficient and the Court declines to adopt plaintiffs' proposed trial plan.

B.

Having followed the case closely and gained a sense of the size of the class as well as the issues that must be hammered out, the Court concludes that Rule 23(b) class certification is not the most fair and efficient way to litigate plaintiffs' claims. Plaintiffs proposed trial schedule now makes it clear to the Court that the benefits of class certification, *i.e.*, accelerated and efficient disposition, will not necessarily follow in this case, but unfairness to the defendant *is* a likely result. Certainly there are cases where the sheer size of a class and the complexity of the common issues would lead a court to conclude that efficiency factors override certain considerations of fairness. Indeed, the fairness concerns that I have identified in this case are not of unconstitutional proportions. But they are factors a district court should consider in exercising the discretion inherent in Rule 23(b). Here, the efficiency problems, combined with the unfairness issues, lead the Court to determine that the class action procedure is not the best method of case management.

C.

With this in mind, the Court finds that the case can now best be handled in the following manner. The trial of the named plaintiffs' claims will proceed as scheduled on October 28, 1996, where the issues of individual liability, damages, and punitive damages will be litigated. The discovery deadline is extended until September 17, 1996, and dispositive motions must be filed no later than September 27, 1996.

At trial, the named plaintiffs will be allowed to produce evidence of pattern and practice discrimination, including evidence from the 46 non-named plaintiffs relevant to the issue of pattern and practice. Defendant will be permitted to put on a full defense to the pattern and practice claims. If there is a finding of pattern and practice discrimination, defendant will be collaterally estopped from denying the existence of such discrimination at subsequent trials. Future plaintiffs must file individual suits and pay the filing fees, reducing the number of frivolous and *de minimis* claims. The Court then may choose to consolidate some of the subsequent suits and try them in bulk as it sees fit.

V. Conclusion

When all is said and done, even if plaintiffs are able to establish that Circuit City's allegedly excessive subjective decisionmaking is a corporate device which makes individual cases of discrimination possible, or even probable, the focus of each individual plaintiff's proof, defendant's response to each plaintiff, and the jury's inquiry is whether each individual employment decision was motivated by intentional racial discrimination. The Court finds that it is more fair and efficient to handle the case as outlined and decertifies the class.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE Aug. 23, 1996

[Filed Aug. 23, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

THIS MATTER is before the Court on plaintiffs' motion to sever and to adopt a bifurcated trial plan. For the reasons stated in the accompanying Memorandum Opinion, the Court DENIES the motion, DECERTIFIES the class in this action, and IMPLEMENTS a new case management plan. In accordance with the trial plan outlined in the Memorandum, the discovery deadline is extended until September 17, 1996, and dispositive motions must be filed no later than September 27, 1996.

The Clerk is DIRECTED to send copies of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
United States District Judge

DATE: Aug. 23, 1996

APPENDIX G

[Filed Apr. 30, 1996]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISON

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on plaintiffs' motion for class certification. The putative class is comprised of current or former employees of Circuit City Stores, Inc. ("Circuit City") who are suing for discrimination in promotion and transfer opportunities. The amended complaint describes Circuit City's alleged discriminatory practices as:

> making personnel decisions using procedures and criteria for selection that are excessively subjective and that are used for the purpose, and have the effect, of denying opportunities for promotion and transfer to qualified [black] employees [at Circuit City's Headquarters] because of their race and that are not related to the position in question and consistent with business necessity.

For the reasons stated herein, the Court finds that the proposed class of plaintiffs satisfies the requirements of

Rule 23 of the Federal Rules of Civil Procedure and will GRANT plaintiffs' motion. The Court reserves its authority under Rule 23(c)(1) to restructure or decertify the class if subsequent events so warrant.

I.

CIRCUIT CITY'S CORPORATE STRUCTURE

Circuit City operates a nationwide chain of retail stores selling electronics and appliance products. Circuit City's Headquarters, located in Richmond, is housed primarily in two buildings known as "Deep Run One" and "Deep Run Two." Approximately 3,500 employees work in the buildings and approximately 2,600 of those workers are white and 800 are black. Other minorities account for the remaining 100-150 employees. There are six major departments at Headquarters and each department is headed by an Executive Vice-President and Senior Vice-President. Each of the departments and all of the 3,500 employees are directed by this small group of senior executives, all of whom are white. Most of the directors, managers and supervisors in all departments are white. Senior Vice-President William Zierden heads the Human Resources Department. Human Resources directs the formulation and implementation of Circuit City's policies and practices for promoting and transferring employees at Headquarters.

All parties agree that individual managers and supervisors make promotion and transfer decisions pursuant to subjective criteria, policies, and procedures. Any Headquarters employee who has people reporting to him or her has authority to grant a promotion or to select another employee or applicant to fill a vacant position. No one is required to approve a selection for it to become valid and Circuit City does not conduct any review of promotion decisions.

II.

STATEMENT OF THE CASE

Circuit City Stores, Inc. ("Circuit City") argues that the proposed class does not meet three of the requirements for class certification—commonality, typicality, and adequacy of representation—because the plaintiffs have failed to identify a specific act or practice that has caused the alleged injury. Circuit City maintains that the actual claims of the plaintiffs are unique and contain no common theme or logical connection.

Plaintiffs, on the other hand, argue that Circuit City maintains subjective promotion practices that have a similar discriminatory effect on black employees. This subjective decision-making is, according to plaintiffs, the common thread connecting the claims of the proposed class members and justifying class certification. Promotion and transfer decisions for employees at Headquarters are made by supervisors and managers who exercise "almost unfettered discretion" over all aspects of the promotion and transfer selection process. Circuit City has no uniform or written job descriptions for positions at Headquarters. Thus, there are no Circuit City policies or instructions governing those factors or information that may or should be considered by managers and supervisors when making a selection for a vacancy, or the weight to be given to such factors or information. The supervisor or manager making the decision has complete discretion to establish minimum qualifications necessary to be eligible or selected for promotion. Consequently, managers and supervisors are free to tailor job requirements to fit the abilities of applicants they wish to select.

But despite the discretion of individual managers, plaintiffs also maintain that Zierden and other senior executives have ample opportunity, by the support they provide, to communicate their discriminatory attitudes and prefer-

ences to the managers. To support their allegations, plaintiffs rely on statistical and anecdotal evidence addressing the class-wide impact of allegedly discriminatory practices.

First plaintiffs' expert, statistician Dr. Charles Mann, has performed a statistical analysis to demonstrate how Circuit City's subjective criteria and senior management prejudice have affected black employees. In short, Dr. Mann's analysis confirms that blacks remain in the lowest paying jobs at Circuit City and that comparisons in rates of promotion reveal disparities which imply that racial discrimination is at play.

Additionally, Circuit City executives allegedly have complained that blacks are not suited to be corporate managers. For example, plaintiff Renee Lowery, alleges that Zierden, head of Human Resources, told her "that when you hire black store managers, the whole store turns black, sales go down, customers come in and wonder what's going on." Deposition of Renee Lowery at 297. When Austin Ligon was senior vice president in charge of Corporate Planning, he told Lowery "Circuit City [is] not [a] very receptive . . . place for minorities and women." *Id.* at 296. Likewise, Larry Jones, an unsuccessful Headquarters applicant, alleges that Zierden told him in an interview that Circuit City would "rarely" bring blacks to Corporate Headquarters who had worked on the "sales floor" because "most blacks are incapable are [sic] performing at the corporate level," and because they were often involved in stealing in the stores. Declaration of Larry Jones.

Hence, plaintiffs contend that the subjective criteria utilized by managers combined with the racial animus of senior management provide the evidence of common disparate treatment and impact, warranting class certification.

III.

ANALYSIS

1. The Law of Class Certification

The critical issues before the Court are whether the plaintiffs have satisfied the commonality, typicality, adequacy of representation, and numerosity requirements of Fed. R. Civ. P. 23(a) in alleging that subjective decision-making processes have caused discrimination against black Circuit City employees.

As a collateral matter, it should be noted that the United States Supreme Court has cautioned against a review of the merits during the certification proceeding except as necessary to determine if the Rule 23 requirements have been satisfied. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974). In determining whether to certify the class the court must take the substantive allegations in the complaint as true. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1995), *cert. denied*, 429 U.S. 816 (1976). Furthermore, given the requirement in Rule 23(c)(1) that a certification decision be made as soon as practicable after the commencement of the action, the standard of proof in support of certification tends to be liberal. Indeed, the Fourth Circuit has expressly recognized that requirements for class certification are to be liberally construed in favor of certification, especially because the court can always decertify or alter the class determination if later events so warrant. *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

a. Commonality Requirement

Rule 23(a) requires that plaintiffs make a "specific presentation identifying the questions of law or fact" that are common to the plaintiffs and the members of the proposed class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158 (1982). To satisfy the common-

ality requirement of Rule 23(a), this "specific presentation" must demonstrate that "the named plaintiff's claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 157 n. 13. In this case, the lynchpin of the class certification inquiry case hinges on the commonality element.

In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the Supreme Court held that the use of subjective decision-making processes constitutes an employment practice subject to challenge in both disparate impact and treatment cases. Although the *Watson* Court did not address directly the issue of class certification in such cases, the Court's decision does support the position that a challenge to subjective decision-making is an employment practice that may present common questions of law or fact justifying certification.

For example, in *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (1983), the Fourth Circuit held that the use of subjective criteria can provide a common link among class members. In *Lilly*, the district court found that an overwhelmingly white supervisory force had wielded unlimited discretion, especially in that there were no written job descriptions. *Id.* at 331. Finding the district court's actions to be proper with respect to class certification, the Fourth Circuit stated:

> As to the commonality requirement, the complaint plainly alleged a practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all discharged employees . . . . We conclude, therefore, that the class . . . , under both § 1981 . . . was properly certified.

Id. at 333.

Although the *Lilly* court ultimately determined that the class of plaintiffs had not proven the merits of their case, the court nevertheless found that class certification was

appropriate where white supervisors exercised unbridled discretion in promotion and hiring. *Id.* at 333. In fact, the Fourth Circuit explicitly stated that certification was appropriate in *Lilly* because "certification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group who may assert those claims." *Lilly*, 720 F.2d 332-33.

Arguing that decentralized and autonomous decision making by individual departments managers does not satisfy the commonality requirements of Rule 23, Circuit City relies heavily on *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 277 (4th Cir. 1980). In *Stastny*, the Fourth Circuit reversed a class certification, saying that the "locus of autonomy" in making the challenged employment decisions was a "critical factor" in determining whether the commonality requirement was met. *Id.* at 279. The other critical factor was whether candidates for management positions came from a "statewide" workforce labor pool, or essentially from the workforce of each separate facility, or from some intermediate pool. *Id.* In denying statewide class certification, the court relied on the district court's findings that individual plants had local autonomy and separate labor pools.

Here, defendant states that Circuit City's promotions almost all occur within the same department or subdivision. Although the *Stastny* court was considering geographically separate facilities, Circuit City contends that the same local autonomy and local labor pool focus should apply to the autonomous individual managers in separate departments at Circuit City.

Plaintiffs argue that *Stastny* is inapplicable in this case because the *Stastny* plaintiffs challenged multiple facilities, whereas here, a single unit of Circuit City is involved—Headquarters. Notwithstanding Circuit City's contentions to the contrary, plaintiffs aver that Headquarters operates as a single unit. Management trainees rotate through dif-

ferent departments, inter-departmental transfers occur, and the same Human Resources department services all departments and managers at Headquarters. *See Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir. 1993) (commonality and typicality requirements met where two plants utilized the same subjective criteria at both facilities, white supervisors applied criteria at both facilities, employees were transferred between the two plants, and two plants used the same Employee Handbook); *Green v. USX*, 896 F.2d 801 (3d Cir. 1990) (upholding class certification where "[t]he district court found 'that the process by which [employer] divined who, among its applicants, were the best qualified, was wholly subjective, consisting of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant.") (quoting *Green v. USX*, 570 F. Supp. 254, 269 (E.D. Pa. 1983)).

Moreover, unlike the plantiffs in *Stastny*, plaintiffs here allege an element of influence and control in the form of implicit directions by senior managers concerning how individual managers should exercise their discretion, another link among their claims of promotion and transfer denial.

Defendant also attacks Dr. Mann's statistical analysis, saying that it is unreliable, irrelevant, and incapable of demonstrating a pattern and practice of discrimination by Circuit City. For instance, Circuit City claims Dr. Mann's analysis does not support a claim of discrimination because he treats promotions as if they had all been made by a single decision maker at Headquarters, rather than by the dozens of individual managers and supervisors in different departments. *See Stastny*, 628 F.2d at 274 (rejecting statistical analysis because statistical data was not broken out into separate facilities).

Urging the Court to reject Dr. Mann's analysis, Circuit City relies on its own expert, Dr. Joan Haworth, who has concluded that there is a complete absence of a pattern

of adverse treatment against blacks at Circuit City. However, at this juncture, the Court cannot consider the merits of any parties' statistical results, but instead must accept Dr. Mann's analysis for purposes of class certification. A duel of the experts will play itself out at a later stage in the litigation process.

In sum, plaintiffs argue that Dr. Mann's observations and statistical analyses strongly suggest that black employees at Headquarters have confronted barriers to their advancement. Moreover, plaintiffs maintain that the managers' and supervisors' subjective decision making procedures comprise a common discriminatory link among the putative class members. These practices, coupled with the racial animus of white executives, permeate the corporate culture and have resulted in disparate impact and disparate treatment to black employees. These allegations are sufficient to satisfy the commonality requirement of Rule 23(a).

b. Typicality Requirement

In addition to establishing commonality, the individual plaintiffs must show that their claims are typical of the potential class. Determination of whether the name plaintiffs' claims are "typical" of the claims of potential class members is guided by *Falcon*, 457 U.S. 147 (1982). In *Falcon*, the Supreme Court rejected a lower court's "across the board" rule that an employee who suffers racial discrimination in any employment practice automatically may maintain a class action for all discriminatory employment practices. Instead, each case must turn on whether the individual claim of the named plaintiff and the claims of the class he purports to represent raise common questions of law or fact. *Id.* "[T]ypicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' "

Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988) (citations omitted).

Applying *Falcon* the *Lilly* court found that the named plaintiffs' individual and class-wide claims overlapped on several pieces of proof: "the absence of written, objective criteria for promotions and terminations, the absence of regular job performance evaluations, and the presence of an overwhelming white supervisory force." 720 F.2d at 333-34. In the instant case, plaintiffs have alleged similar overlapping claims, leading the Court to determine that typicality is present among the putative class members' claims.

c. Adequate Representation Requirement

The adequacy of representation requirement incorporates two criteria: (1) the named plaintiffs must not have interests that are antagnostic to those of the putative class members and (2) the court must find that the class would represented [sic] by qualified counsel who will vigorously prosecute the action. *Rodger v. Electronic Data Sys. Corp.*, 160 F.R.D. 532 (E.D.N.C. 1995). Circuit City has demonstrated nothing to indicate that plaintiffs have not satisfied these criteria. As such, the Court finds that the named plaintiffs and their counsel will represent the putative class members adequately for purposes of Rule 23(a).

d. Numerosity Requirement

Plaintiffs maintain that they have satisfied Rule 23(a)'s numerosity requirement and that joinder is impracticable. There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied, but joinder should be impracticable. *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). Reasonable estimates of class size are sufficient to show numerosity. In *Holsey*, the Fourth Circuit upheld class certification in an

employment discrimination suit where the company employed between 46 and 60 black employees annually. Likewise, the numerosity requirement was met where the employer employed some two hundred blacks and promoted over one hundred employees annually. *Lilly*, 720 F.2d at 333.

In the instant case, Circuit City employs approximately 3500 persons total, with about 800 blacks. Additionally, plaintiffs' attorneys claim they have received numerous calls from present and former black Headquarters employees who wish to join the class. Consequently, the Court finds that joinder is not practical in this case and the numerosity requirement has been fulfilled.

2. Can Plaintiffs Maintain a Rule 23(b)(2) or 23(b)(3) Class Action?

Upon satisfaction of the four requirements set forth in Rule 23(a), the Court must consider the type of class to be maintained under Rule 23(b). In their Complaint, plaintiffs have asserted that this action is maintainable under Rule 23(b)(2) or Rule 23(b)(3). Where a class is maintainable under both sections, courts prefer (b)(2) certification. Under Rule 23(b)(2), an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).[1]

Here, plaintiffs have requested monetary damages in addition to injunctive relief. Arguing against 23(b)(2) certification, Circuit City avers that plaintiffs' prayers for monetary relief will dominate the proceedings because

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[1] Rule 23(b)(3) allows plaintiffs to maintain a class action where "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

they will require separate calculations of each person's lost wages, back pay period, interim earnings, efforts to mitigate damages, as well as the amount of compensatory damages for individual emotional distress, humiliation, and embarrassment. While Rule 23(b)(2) only refers to declaratory and injunctive relief, a request for monetary relief will not defeat Rule 23(b)(2) class certification where injunctive relief is requested and predominates. Indeed, Rule 23(b)(2) certification is typically granted in employment discrimination cases, even where monetary damages are requested. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) (Monetary relief is appropriate in class actions under Rule 23(b)(2).); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989) ("[T]he Advisory Committee's Note suggestion that suit for damages is 'not appropriate' for class certification has proved unworkable and is increasingly disregarded.") As a result, the Court hereby certifies the class in accordance with Rule 23(b)(2).

IV.

CONCLUSION

Accordingly, the Court GRANTS plaintiffs' motion for class certification and CERTIFIES the class under Rule 23(b)(2). This certification is conditional. The Court may, if events so warrant, alter or decertify the class pursuant to Rule 23(c)(1).

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

DATE: Apr. 30, 1996

[Filed Apr. 30, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action Number 3:95CV964

SHELBY MCKNIGHT, *et al.*,
Plaintiffs,

v.

CIRCUIT CITY STORES, INC.,
Defendant.

ORDER

Upon consideration of plaintiffs' motion for class certification, the opposition of defendant, supplemental memoranda, and the record in this case, the Court hereby GRANTS the motion of the plaintiffs and CERTIFIES this action as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

/s/ James R. Spencer
United States District Judge

DATE: Apr. 30, 1996

APPENDIX H

Civil Rights Act of 1964
42 U.S.C. § 2000e-5(f) and (g)

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure, appointment of attorney; payment of fees, costs, or security intervention, stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this

section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, or governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.

Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at

the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or person discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 1981a
Civil Rights Act of 1991

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706 (g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations

implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the American with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C.A. § 12112 (b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with

reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) [42 U.S.C.A. § 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions, of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(2)

No.99-1998

Supreme Court, U.S.
FILED
JUL 12 2000
CLERK

In the Supreme Court of the United States

RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

This case involved 46 consolidated claims of employment discrimination in promotions at Circuit City's 3,500-person headquarters, brought by nine individual plaintiffs. Of these, 43 were rejected either by the court or by the jury; petitioners prevailed on only three. Although the case was not tried as a class action, the jury nonetheless was permitted to find that Circuit City engaged in a "pattern or practice" of discrimination in promotions because its decision-making was decentralized and "excessively" subjective. The petition presents the following questions, both of which were also presented in an earlier petition in this case (No. 98-972):

1. Whether the court of appeals correctly held that the district court did not abuse its discretion in decertifying a class composed of employees who sought damages based on promotion decisions made by numerous different supervisors and managers and involving widely differing positions.

2. Whether the court of appeals erred in modifying a sweeping injunction entered in reliance on a free-standing finding of a "pattern or practice" of discrimination, when only individual causes of action challenging separate promotion decisions made on a decentralized basis by different decision-makers were being adjudicated, the vast majority of which were found to lack merit.

RULE 29.6 STATEMENT

Circuit City Stores, Inc., has no parent company or non-wholly owned subsidiary, but has two series of common stock. Circuit City Group common stock tracks the performance of Circuit City Stores, Inc., while CarMax Group common stock tracks the performance of CarMax Auto Superstores, Inc. CarMax Auto Superstores, Inc., is a wholly owned subsidiary of Circuit City Stores, Inc., which has retained an equity interest in CarMax Group common stock.

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In the Supreme Court of the United States

No. 99-1998

RENEE LOWERY, *et al.*, PETITIONERS

v.

CIRCUIT CITY STORES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

Having failed to prove 43 of their 46 claims, petitioners ask this Court to help them avoid the need actually to prove that they were victims of discrimination. In doing so, petitioners go to great lengths to obscure the poverty of their case. Petitioners were never able at trial to identify any discriminatory policy or practice at Circuit City headquarters, where the racial composition of the workforce belied any claim of systematic discrimination. Instead, petitioners contended that the company's decentralized, non-bureaucratic approach to promotions made it easier for individual supervisors to engage in specific acts of intentional discrimination in making promotions for widely varying positions. Petitioners could not prove that widespread intentional race discrimination in promotions in fact had occurred, however, or that the absence of rigid promotion criteria had *caused* any discrimination to take place.

1. Circuit City operates a chain of retail consumer electronics stores. At the time of trial, it employed approximately 3,500 people at its headquarters, about 800 of whom were African-Americans. Pet. App. 6a, 32a. The headquarters is organized into about a dozen divisions and subdivisions and more than 100 different departments. C.A. App. 1858, 2948.

Hundreds of headquarters employees work for a subsidiary, First North American National Bank ("FNANB"), which has its own, separate human resources department and its own policies. *Id.* at 2216, 2684-2686; Pet. App. 32a.

Circuit City has grown quickly. To keep pace with that growth, Circuit City, like other companies in similar circumstances, has implemented decentralized personnel practices that avoid regimentation and bureaucracy and instead give those making hiring and promotion decisions wide freedom of action. Pet. App. 33a; C.A. App. 2680-2681. Thus, Circuit City does not use written job descriptions; jobs change too quickly. C.A. App. 2688. Employees are regularly evaluated, however, and promotions are based on several factors, including performance, experience, time in position, and education. See *id.* at 1629-1633, 1819-1820, 1853, 2213, 2874-2875, 2951-2953.

For promotions as for many other functions, Circuit City places most if not all responsibility on the person with immediate supervisory responsibility for the position in question. C.A. App. 2202-2204, 2682. As the evidence showed, this policy of decentralized decisionmaking has "strong support among management experts." Pet. App. 33a. Indeed, "[n]onbureaucratic forms of organization and management" are "hallmarks of rapid-growth companies." Albert, *Human Resources Profit Power: Human Resources, Financial Growth Linked*, 67(2) PERSONNEL 47 (1990). This flexibility in hiring and promotions is linked to a clearly stated non-discrimination policy, in support of which Circuit City requires supervisors to attend a week-long seminar that instructs them, *inter alia*, in appropriate, non-discriminatory management practices. See Pet. App. 10a-11a, 33a.

Circuit City's policies have produced a racially diverse workforce at headquarters. Undisputed evidence showed that, "for each significant occupational category defined by the United States Census Bureau, Circuit City employs more African-Americans than the external labor pool would indi-

cate." Pet. App. 34a. For example, within the "Officials and Managers" category, over 9% of Circuit City's 375 hires between 1992 and 1995 were African-Americans, while the relevant pool was only 4% African-American. *Ibid.* It also was undisputed that, during the relevant period, the 178 promotions received by African-Americans amounted to 18% of all promotions at Circuit City headquarters, and, even more significant, 25% of promotions in which both blacks and whites were in the candidate pool; during the same period, the average proportion of African-Americans in the full-time workforce at Circuit City headquarters was about 19%. C.A. App. 1854-1855, 2962.

2. Despite these circumstances, petitioners' counsel spent 30 months vigorously recruiting clients for a class action against Circuit City from the more than 1,500 African-Americans who worked at headquarters between 1992 and 1995. See C.A. App. 230-231. The cases that were consolidated into this action in the Eastern District of Virginia asserted 50 instances of alleged discrimination in hiring, transfers and promotions at Circuit City headquarters; the nine petitioners accounted for 46 of the 50 claims. Pet. App. 41a. The centerpiece of the suit was petitioners' allegation that Circuit City's failure to use more formal and centralized personnel procedures amounted to a "pattern or practice" of racial discrimination under both disparate impact and disparate treatment theories.

The district court initially certified a mandatory, non-opt-out class comprising all African-Americans who had been employed at Circuit City headquarters after April 1992. Pet. App. 42a. Having certified the class, the district court would not permit Circuit City to communicate with any class members, whether or not they claimed to have suffered discrimination, except with prior consent of class counsel or the district court. *Id.* at 64a-65a. This ban extended to the many African-American employees who ***had*** been promoted and who might have provided useful evidence to counter petitioners' claim that Circuit City engaged in pervasive discrimination. And the district court refused to lift its gag order except as to persons

involved in particular decisions challenged by a named plaintiff, to one plaintiff's current supervisor, and to the secretary for the in-house lawyers responsible for the case.

Petitioners proposed a seven-phase trial plan. Pet. App. 133a-135a. After considering this proposal, the district court *sua sponte* decertified the class, noting "problems of fairness and efficiency." *Id.* at 42a. Nonetheless, the court continued to bar Circuit City from trying to contact sympathetic African-American employees. See C.A. App. 618. The district court also granted summary judgment against three petitioners on all their claims. Pet. App. 44a.

When the trial began, the district court reminded the parties that the case was "no longer a class action" (C.A. App. 2042) and "re-emphasized the procedural posture of the case, stating that '[t]his is a case involving six individual plaintiffs. * * * Don't misunderstand.'" Pet. App. 44a. Petitioners were permitted to introduce evidence of a "pattern or practice" of discrimination to support their individual claims. *Ibid.* In fact, however, petitioners could not point to any particular offensive practice. They instead insisted that "Circuit City's insufficiently regimented management practices" (*ibid.*) had made "individual cases of discrimination possible" (*id.* at 138a) in a context in which dozens of supervisors were choosing whom to promote to dozens of widely dissimilar positions.

To support this theory, petitioners presented a diversity consultant, Dr. Richard Beatty, who testified that Circuit City's non-bureaucratic style did not comport with his view of the "best practices," in part because supervisors could rely on subjective as well as objective criteria in choosing whom to promote. C.A. App. 1031, 2726-2732, 2779-2782. In the opinion of this "expert," one of Circuit City's shortcomings was its failure to hire a full-time diversity specialist of its own. See *id.* at 2775-2777. The diversity consultant conceded that there was no "empirical evidence" that the practices he favored would

produce less discrimination than Circuit City's system. *Id.* at 2816-2817.

Petitioners also relied heavily on a statistical study that failed to control for education, performance, or job experience. See Pet. App. 63a-64a; C.A. App. 1015, 2600, 2608-2609. The district court shielded the statistician's testimony from effective cross-examination, however, by refusing to permit access to the data runs, computer programs, and codes on which the testifying expert's opinions relied, ruling that the materials were non-discoverable because they were prepared by other, non-testifying individuals. C.A. App. 509; see Pet. App. 66a-67a.

In addition, petitioners relied on certain "assumption[s]" made by two amateur surveys, along with a selection of hearsay records of anonymous employee comments made in the course of the surveys. Pet. App. 35a-37a. One of the surveys (conducted by a student, Sarah Cook) was limited to FNANB; of the 800 anonymous responses, eight comments arguably related to race. C.A. App. 1085-1613, 2876-2877. The other study (by administrative assistant Karen Booth) related only to four retail stores and had nothing to do with headquarters. Petitioners also testified about a few isolated discriminatory remarks that were not related to any contested promotion decision and that the declarants denied making. And petitioners paraded into court 17 non-plaintiff current and former employees who testified to their subjective belief that various workplace disappointments resulted from discrimination. See *id.* at 44a-45a.[1]

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[1] Circuit City's opening brief to the court of appeals (at 25-26) demonstrated the legal insufficiency (and irrelevance) of the anecdotal testimony. The anecdotal witnesses challenged promotion decisions in a dizzying array of clerical, professional, and management positions: account representative, accounting clerk, return check processor, assistant supervisor of collections, assistant supervisor of various customer service functions, media assistant, project coordinator, graphic artist, financial reporting analyst, supervisor, and manager.

Even in their own, carefully selected individual cases, petitioners had great difficulty proving that the discrimination supposedly made possible by Circuit City's "insufficiently regimented" procedures actually had occurred. Indeed, the district court granted Circuit City judgment as a matter of law on the claims of three petitioners at the close of the plaintiffs' case. Pet. App. 45a.

At the end of the trial, the district court instructed the jury to decide "first of all" whether Circuit City had engaged in a "pattern or practice" of discriminatory promotions ***before*** considering whether the three remaining petitioners had established *any* of their individual discrimination claims. C.A. App. 3125-3126; Pet. App. 46a. The district court intended this interrogatory to support a species of one-way class action. If the jury returned a "finding of pattern or practice discrimination, the district court stated that Circuit City would be collaterally estopped from denying the existence of such discrimination at subsequent trials." Pet. App. 44a. On the other hand, a verdict for Circuit City on the "pattern or practice" question would not assist the defense of future litigation brought against it by non-parties.

Presented with the separate "pattern or practice" interrogatory as a preliminary step to finding liability in any individual case, see Pet. App. 46a, the jury found a "pattern or practice" in the abstract — but then rejected 12 of the 15 concrete claims of discrimination that were before it, including both of petitioner McKnight's claims. See *ibid.* The jury found that, in three instances, Circuit City had discriminated by promoting other women ahead of petitioners Lowery and Peterson, and it awarded a total of $16,700 in back pay and compensatory damages. Having been instructed that the "[c]ivil rights laws are difficult to enforce without the threat to defendants of liability for punitive damages" (C.A. App. 3121), the jury awarded a total of $272,000 in punitive damages. Pet. App. 46a.

After trial, the district court entered judgment for Circuit City on petitioners' disparate impact claim, holding that they had failed to identify any "specific elements" of Circuit City's promotion practices that "ha[d] a significant disparate impact on African-American employees." C.A. App. 706 (omitted from petitioners' appendix). In an unprecedented procedural innovation, however, the district court relied on the jury verdict to enter a free-standing "judgment" (also omitted from petitioners' appendix) that Circuit City had engaged in a "pattern or practice" of ***intentional*** discrimination. *Id.* at 700.

Based on that "judgment," the district court ordered Circuit City to restructure personnel procedures at headquarters along the lines suggested by petitioners' diversity consultant. The sweeping decree broadly prohibited Circuit City from "taking any adverse employment action against any African American employee" and required Circuit City to hire specialists in employment diversity, to adopt race-based mentoring programs, to engage in detailed record-keeping (to be measured against *de facto* quotas), and to submit to continuing oversight by petitioners' counsel and experts, as well as by the court itself. See Pet. App. 47a-48a; 108a-116a. The district court also ordered specific relief for petitioner Lowery (petitioner Peterson having left Circuit City), and awarded petitioners' counsel nearly $4 million in attorneys' fees and costs. See *id.* at 48a-49a.

3. The court of appeals stayed the decree pending appeal, except for the injunctive provisions specific to petitioner Lowery. Pet. App. 49a. On the merits, a unanimous panel (Murnaghan, Wilkins, and Hamilton, JJ.) affirmed in part and vacated in part.

The court of appeals affirmed the district court's decision to decertify the purported class, rejecting petitioners' argument that the district court somehow had "los[t] its discretion" to do so. Pet. App. 50a. Observing that "efficiency is one of the primary purposes of class action procedure," *id.* at 52a n.5, the court of appeals held that the district court appropriately

exercised its discretion to decertify the purported class based on "legitimate concerns that trying the suit as a class action would be unwieldy and unfair to Circuit City." *Id.* at 52a.

The court of appeals also vacated the free-standing "pattern or practice" "judgment." It acknowledged that individual plaintiffs "may use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination." Pet. App. 57a. Nevertheless, "individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII" separate from their claims for relief from discrimination they themselves may have suffered. *Id.* at 54a.

The Fourth Circuit affirmed the jury verdict against petitioner McKnight and the dismissal of all claims made by six other petitioners. It explained that four of the dismissed petitioners "failed to establish a prima facie case of discrimination" (Pet. App. 60a), while the other two "failed to demonstrate that Circuit City's articulated reasons for passing them up for promotion were pretextual" (*id.* at 61a). The court of appeals held that petitioners' statistical evidence was insufficient to show pretext because the study did not "adequately control for factors other than race that could account for the disparity in promotions" at Circuit City, "notabl[y]" including the effect of "educational level * * * on promotions at Circuit City." *Id.* at 63a.

Next, the court of appeals affirmed, without analysis, the judgments in favor of petitioners Peterson and Lowery. Pet. App. 64a n.7. The court noted, however, that the record clearly showed "that Lowery and Peterson had problems that, at least partially, led to their being passed up for promotion." *Id.* at 68a. Those problems included Peterson's "deficient" performance "during her two rotations as assistant supervisor" (*id.* at 40a) and Lowery's shortcomings in training recruiters, providing leadership, and coherent communication (see *id.* at 37a-38a). This evidence, which made liability borderline, rendered

the "extraordinary remedy of punitive damages * * * not appropriate" in the absence of "egregious" conduct. *Id.* at 68a.

Given the very limited number of successful claims, the court of appeals substantially narrowed the district court's injunction, leaving in place only the provisions relating to petitioner Lowery. Pet. App. 68a. It vacated the extensive provisions requiring Circuit City to create a "Department of Diversity Management" and implement a wide variety of other programs "subject to Plaintiffs' approval, for which Plaintiffs' counsel [could] apply quarterly for fees and expenses incurred in the monitoring and enforcement of the order." *Id.* at 69a. These "class-wide remedies" with their "labyrinthine provisions for reporting and enforcement" amounted to an abuse of discretion because they "far surpass[ed] those needed — and [we]re far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." *Id.* at 69a.

Although the Fourth Circuit recognized that "occasionally individual relief equates to class-wide relief" (Pet. App. 69a), that was not the case here, and the vacated "pattern or practice * * * 'claim'" provided no basis for "such broad and sweeping relief." *Id.* at 70a. The court of appeals also identified flaws in other parts of the decree ranging from the "go-thy-way-and-sin-no-more provision" that would "impermissibly subject[]" Circuit City "to contempt proceedings for conduct unlike and unrelated to the violation with which it was originally charged" (*ibid.*), to the segregated "career development and mentoring program" for African-Americans only (*id.* at 69a-70a), to the provision that "on its face * * * would prevent Circuit City from taking" any adverse action against any African-American employee "even if the employee indisputably merited the adverse action and the action was undeniably nondiscriminatory." *Id.* at 70a.

Finally, the court of appeals vacated the award of nearly $4 million in attorneys' fees and costs. It noted that "of the fifty

claims filed, the Plaintiffs prevailed on only three," Pet. App. 72a, manifesting "a very low degree of success." *Id.* at 71a.

4. Petitioners sought review from this Court. Their petition (No. 98-972) raised the same two questions presented in this petition (albeit with different phrasing). The first petition also sought review of the Fourth Circuit's rejection of plaintiffs' statistical evidence and challenged the reversal of the punitive damages award. This Court declined to hear the case on the merits but did vacate the judgment and remand the case to the court of appeals for further consideration in light of *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), which addressed only punitive damages issues. See 527 U.S. 1031 (1999). On remand, the Fourth Circuit reinstated the punitive damages award and "slightly modif[ied]" its "instructions to the district court regarding redetermination * * * of attorney's fees and costs." Pet. App. 5a.

ARGUMENT

By no criterion does this case warrant further review. The Court declined to review the two questions presented here at the time they were presented in No. 98-972, and nothing has changed since then to make them any more worthy of review now.[2]

Petitioners alleged 46 individual acts of discrimination in promotions at Circuit City's headquarters; ***43 of those claims were rejected in the district court.*** Perhaps driven by necessity born of the dearth of evidence of actual discrimination, petitioners put forward a theory of "pattern or practice" discrimination, asserting that the ***absence*** of detailed procedures —

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[2] The remand in response to the earlier petition was solely for the purpose of reconsidering the sufficiency of the evidence with respect to punitive damages. Because the disposition of that issue could not in any way have affected the "certworthiness" of the other issues raised in No. 98-972 and raised again here, the Court's earlier action was tantamount to a denial of certiorari on those issues.

procedures that even petitioners' expert conceded had not been shown to reduce discrimination — made it ***possible*** for supervisors and managers scattered across a hundred departments to discriminate intentionally when filling hundreds of vastly different jobs.

The court of appeals correctly rejected petitioners' unprecedented attempt to rely on that "pattern or practice" to avoid their burden of proof under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and to restructure Circuit City's entire promotion system. Instead, it upheld the damages awards to the two petitioners actually found to have suffered isolated acts of discrimination and the injunctive relief related thereto, but otherwise rejected petitioners' claims.

I. THE AFFIRMANCE OF THE DISCRETIONARY DECERTIFICATION OF THE PLAINTIFF CLASS PRESENTS NO ISSUE WARRANTING FURTHER REVIEW

The class certification issues in this case are unremarkable. The Fourth Circuit held nothing more than that the district court did not ***abuse its discretion*** when it required ***these plaintiffs*** to forgo the class mechanism in ***this case***. Pet. App. 53a. That fact-bound determination accords with the analysis of the other courts of appeals to consider similar issues under Rule 23(b)(2) and presents no basis for further review.

A. This Court has emphasized that Rule 23 of the Federal Rules of Civil Procedure vests "broad power and discretion" in district courts "with respect to matters involving the certification and management of potentially ***cumbersome*** or frivolous class actions." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (emphasis added). The Court recognized that only "sound discretion and use of the tools available" could prevent "administrative chaos" and "class-action harassment." *Ibid.* Petitioners take issue with this view. They suggest that the Court should second-guess the Fourth Circuit's entirely unremarkable holding that, given the nature of the disparate

"class" that petitioners proposed here, the district court acted within its discretion in decertifying the class precisely because it was cumbersome and inefficient.

The petition invokes general policies underlying employment discrimination class actions in an effort to distract the Court from the fundamental peculiarity of ***this*** case and the reasonableness of the decision below. As the Fourth Circuit recognized, the broad principles on which petitioners rely are "beside the point." Pet. App. 53a. The petition simply ignores what it cannot controvert: the disparate plaintiffs' individual requests for significant compensatory and punitive relief swamped the request for injunctive relief and would have made class treatment inefficient, unmanageable, and unfair. *Id.* at 52a-53a.[3] If any further demonstration of that conclusion were needed, it may readily be found in the fact that most of the specific claims that petitioners presented were found to lack merit.

B. Petitioners repeatedly assert (Pet. 11, 12, 13, 16) that the affirmance of the district court's discretionary decertification somehow amounts to the sort of "judicial inventiveness" disapproved in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). Petitioners turn *Amchem* squarely on its head when they advance its ***limitation*** of the scope of permissible class certification as a basis for making class certification

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[3] Petitioners erroneously claim (Pet. 12) that the decision below would prevent ***any*** employment discrimination plaintiff from seeking both individual damages and broad injunctive relief. The closest thing to a common thread linking petitioners' claims was the assertion that Circuit City should have tried to make it harder for supervisors to stray into specific discriminatory actions by using an array of bureaucratic procedures of unproven and highly doubtful efficacy. Nothing in the decision below forecloses the ability of a more cohesive, sensibly constituted class of discrimination plaintiffs — or, for that matter, an individual plaintiff for whom equitable relief depended on the eradication of an identifiable practice (see Pet. App. 69a) — to seek both monetary and injunctive relief.

mandatory whenever an omnibus damages action also asserts a claim for injunctive relief. In *Amchem* this Court forbade lower courts to ***waive*** the ***minimum*** requirements of Rule 23 in order to certify classes for settlement. Nothing in *Amchem* suggests that any case that arguably meets the requirements of Rule 23 ***must*** be certified as a class action regardless of the circumstances. Likewise, not one word of *Amchem* alters the longstanding recognition that a district court should not maintain a class action that does not "advance the efficiency and economy of litigation which is a principal purpose of the procedure." *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 159 (1982) (quoting *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 553 (1974)). To the contrary, *Amchem* reiterated the universal view that "Rule 23(b)(2) ***permits***" — but does not require — "class actions for declaratory or injunctive relief." 521 U.S. at 614 (emphasis added).[4]

The Fourth Circuit properly rejected the view that district courts somehow "lose[] their discretion to certify or decertify [a] class" whenever employees seeking millions of dollars in compensatory damages for a hodge-podge of individual discrimination claims — in different departments and vastly disparate positions — also seek employer-wide injunctive relief. Pet. App. 50a. Petitioners offer no support for such an extreme view here. Indeed, as the Fourth Circuit observed, this "Court has rejected the proposition that merely alleging a pattern or practice of discrimination automatically entitles plaintiffs to class certification." Pet. App. 53a, citing *Falcon*,

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[4] In *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), the Court again disapproved "adventurous application" of a subsection of Rule 23 to certify classes. *Id.* at 845. Although the Rule "on its face" was "open to a more lenient" and inclusive reading, the Court rejected the putative class in *Ortiz* in light of "historical antecedents" to the Rule. *Id.* at 843. As in *Amchem*, the Court in *Ortiz* curbed the judicial expansion of Rule 23 without in any way undercutting the discretion of a district court ***not*** to certify a class that it believed met the facial requirements of the Rule.

457 U.S. at 155-157, and *East Texas Motor Freight Systems* v. *Rodriguez*, 431 U.S. 395, 405-06 (1977).

C. Petitioners do not identify a single conflicting decision by a court of appeals reviewing the refusal to certify a class of discrimination plaintiffs seeking significant monetary damages as well as injunctive relief. Indeed, the only courts of appeals to address similar attempts to misuse the class action device have likewise held that class certification under Rule 23(b)(2) is ***not*** mandatory — if anything taking a stronger stand against such proposals. See *Lemon* v. *International Union of Operating Engineers*, ___ F.3d ___, 2000 WL 733577 (7th Cir. June 9, 2000); *Jefferson* v. *Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997).

In *Allison*, the Fifth Circuit affirmed a district court's refusal to certify a class of employment discrimination plaintiffs who were dispersed across multiple "skill groups" and "functional areas" and who asserted commonality based on "challenging general hiring, training and promotional policies," such as "use of subjective decision-making." 151 F.3d at 407. The Fifth Circuit affirmed the district court's exercise of its "substantial discretion in determining whether to certify a class action" (*id.* at 408), relying in part on the problems of "efficiency and manageability" presented by the proposed class (*id.* at 415). The Fifth Circuit concluded, consistently with the decision here, that class certification may be denied where a widely heterogeneous class of employees seeks both monetary and injunctive relief. *Id.* at 418. In fact, the Fifth Circuit went further than the court below, holding that in such cases injunctive relief plainly is not predominant, so that a district court would necessarily abuse its discretion if it *did* certify a plaintiff class. See *id.* at 415-418.

Likewise, the Eleventh Circuit in *Jackson* issued a writ of mandamus to decertify a class consisting of persons claiming

that a motel chain discriminated against them. Although the plaintiffs in *Jackson* sought injunctive relief against a supposed "practice or policy" of discrimination as well as damages, the court did not find Rule 23(b)(2) to be even "arguably fulfilled" by such a disparate class of damages-seeking plaintiffs (130 F.3d at 1005), presumably because the injunctive relief against the alleged practice was not predominant over the damages claims (see *id.* at 1005-1006). The court revoked certification after finding that Rule 23(b)(3) also was not satisfied.

Since the Court last considered petitioners' arguments on this point in No. 98-972, another circuit has reinforced the cohesion among the courts of appeals. The Seventh Circuit twice has followed *Allison* and held that Rule 23(b)(2) does not permit certification of broad and disparate classes of damages plaintiffs in employment discrimination actions. In *Jefferson*, the court accepted an interlocutory appeal and vacated certification of such a class under Rule 23(b)(2). The court held "a no-notice, non-opt-out class" may be certified under Rule 23(b)(2) "only when monetary relief is incidental to the equitable remedy," that is, "tangential." 195 F.3d at 897, 898. Likewise, in *Lemon*, the Seventh Circuit evaluated a putative class of 400 union members who alleged that the business manager of their local union "was racist and manipulated the referral system to pass over minorities and women." 2000 WL 733577, at *1. In rejecting class certification under Rule 23(b)(2), the court of appeals observed that "individual claims for compensatory or punitive damages typically require judicial inquiry into the particularized merits of each individual plaintiff's claim," contrary to the "presumption of cohesion and homogeneity" that underlies that Rule. *Id.* at *2.

Throughout this litigation, petitioners suggested that dozens or even hundreds of class members would press individual damages claims. Indeed, petitioners' failed effort to extract a $15 million settlement from Circuit City (see C.A. App. 4361-4363) confirms that petitioners placed primary emphasis on the pecuniary aspects of this case. The fairness,

efficiency and manageability concerns cited by the district court, and reiterated by the court of appeals, all flow from the fact that common injunctive relief did not at all predominate over the individual, damages-related issues. Indeed,in certifying the class, the district court could not bring itself to state that equitable relief was predominant in this case, much less to explain how that could be so. See Pet. App. 136a. Thus, if the district court erred, it was in certifying the class under Rule 23(b)(2) in the first place, not in decertifying this disparate pseudo-class. These circumstances make this case an especially poor vehicle for further review.

C. Petitioners try to disguise their pursuit of a novel rule of mandatory class certification under Rule 23(b)(2) by professing a concern for distinguishing the requirements of that Rule from those of Rule 23(b)(3). Petitioners must hope that this Court will overlook what the Fourth Circuit actually held: "[W]e do not mean to imply that the factors for certifying a Rule 23(b)(3) class should be imported into Rule 23(b)(2) classes." Pet. App. 52a n.5. Rather, the court of appeals continued, in terms that echo this Court's instructions in *Sonotone*, 442 U.S. at 345, "because efficiency is one of the primary purposes of class action procedure, * * * in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." Pet. App. 52a n.5.

The actual holding of the Fourth Circuit renders irrelevant the supposedly conflicting statements made by other courts of appeals in decisions, rendered outside the discrimination context, where proof of plaintiff-specific damages was ***not*** at issue. The feasibility of class treatment is quite different when an action seeks ***only*** injunctive relief, or injunctive relief combined with incidental restitutionary remedies that are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison*, 151 F.3d at 415 (distinguishing *Forbush* v. *J.C. Penney Co.*,

994 F.2d 1101, 1105 (5th Cir. 1993)).[5] Just such an absence of circumstance-specific damages awards characterized the cases cited at Pet. 15-16, in which courts observed, in full accordance with the decision below, that compliance with all of the factors enumerated in Rule 23(b)(3) was not a ***general prerequisite*** to ***eligibility*** for certification under Rule 23(b)(2).[6] The asserted conflict is illusory.[7]

D. Petitioners' true motivation in asking this Court to review the class certification issue is their hope to evade their burden of proof by gaining the benefit of the presumption of discrimination that was imposed in *Teamsters* v. *United States*, 431 U.S. 324 (1977). See Pet. 19-20. Petitioners' eagerness to

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[5] Petitioners claim that *Forbush* conflicts with the decision below, but the Fifth Circuit amply distinguished the issues in *Allison* (which replicate those here) from those in *Forbush*. See 151 F.3d at 415. Any tension among Fifth Circuit decisions is a matter for that court — which declined to rehear *Allison* en banc, *id.* at 434. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[6] See *Penland* v. *Warren County Jail*, 797 F.2d 332, 334 (6th Cir. 1986) (injunctive relief for jail conditions); *Norris* v. *Frame*, 585 F.2d 1183, 1189 n.18 (3d Cir. 1978) (injunctive relief for pre-trial detainees; dictum on class certification); *Alliance to End Repression* v. *Rochford*, 565 F.2d 975, 976 n.2, 979 (7th Cir. 1977) (challenge to police surveillance; damages not certified); *Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977) (challenge to government benefits recoupment procedure, damages not awarded), aff'd in part and rev'd in part *sub nom. Califano* v. *Yamasaki*, 442 U.S. 682 (1979).

[7] Petitioners also assert a conflict with *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553-1558 (11th Cir. 1986), cert. denied, 479 U.S. 883 (1986), in which the Eleventh Circuit held that a plaintiff class had been erroneously decertified under Rule 23(a). The *Cox* court did not discuss Rule 23(b)(2) in that Title VII case, brought in an era when that statute provided only equitable relief. The Fourth Circuit accurately recognized that its holding was "not in conflict" with *Cox*. Pet. App. 59a. *Allison*, not *Cox*, represents Eleventh Circuit law on the certification issue presented here.

avoid their burden of proof is understandable in light of their dismal success rate: their 46 claims of discrimination, tested by normal legal standards, were found wanting 43 times.

The "pattern or practice" claim, on which petitioners rely for class certification, reduces to an assertion that Circuit City's procedures did not adequately stamp out every opportunity for intentional discrimination. The generally insubstantial individual complaints, however, were not meaningfully fortified by the still flimsier "pattern or practice" evidence. The linchpin of that evidence was a statistical analysis so unsound that the Fourth Circuit — in a determination not now contested — held it insufficient even to help prove pretext in an individual case, Pet. App. 63a, much less to serve as the basis for shifted burdens of proof or a massive injunction.

Petitioners want the Court to assume that intentional discrimination is pervasive even though, when put to the test of proving that assumption, petitioners failed more than 90% of the time.[8] The shortcomings of petitioners' claims confirm the soundness of applying the normal burdens of proof.

Plaintiffs also suggest (Pet. 19-20) that they were entitled to a *Teamsters* presumption in their individual cases regardless of class certification. That argument is not properly before the Court. See S. Ct. R. 14.1(a). Whether the burden of proof may be reversed in an individual case is not among the questions presented by the petition, which address class decertification and the scope of relief. See Pet. i. Shifting the burden of proof in individual cases is not "fairly included" within those questions. S. Ct. R. 14.1(a).

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[8] The extreme nature of petitioners' position is clear from their suggestion (Pet. 10, 21) that failure to preclude jury consideration of punitive damages in an individual discrimination case *ipso facto* supports class certification, sweeping injunctive relief, and a reversal of the burden of proof.

In any event, petitioners' contention lacks merit. See No. 98-972, Br. in Opp. 20-22. There is nothing to petitioners' suggestion (Pet. 19) that the Fourth Circuit "elevated form over substance" in holding that the decertification decision precluded the *Teamsters* presumption. As the Fourth Circuit observed, this "Court has never indicated that an inference of discrimination should arise in an individual case until the plaintiff has proved ***all*** elements of a *prima facie* case. See *McDonnell Douglas*, 411 U.S. at 802." Pet. App. 58a (emphasis in original).

Not surprisingly, petitioners cannot identify a single decision by a court of appeals that adopts their proposed reversal of the burdens. To the contrary, as the Fourth Circuit recognized, in the rare instances when this issue has been broached even obliquely, "[t]he relevant case law on the subject" in other courts of appeals "supports [the] conclusion" it reached. Pet. App. 59a (citing decisions from the Fifth and Seventh Circuits). And there certainly is no "direct conflict" (Pet. 20) between the decision in this case and the dictum in *Cox*, 784 F.2d at 1559. In *Cox*, the Eleventh Circuit recertified the class, *id.* at 1558, before ordering that the retrial proceed as a "pattern and practice suit," *id.* at 1562, and suggesting that, in some other case, the *Teamsters* presumption might apply regardless of class certification. *Id.* at 1559. See also Pet. App. 59a-60a.

Few employment discrimination cases could be less well suited to application of the *Teamsters* presumption than this one. The presumption is designed to address the situation in which a practice of an employer operates to produce fairly consistently discriminatory outcomes. Here, there is no identifiable "practice," much less any causal relationship between practice and outcome; moreover, the record in this case, in contrast to cases like *Teamsters*, shows at most a rare incidence of discriminatory promotion decisions within Circuit City's framework of decentralized decision-making. Only by traveling through the looking glass could one suppose that these circumstances rationally justify use of a presumption of discrimination

at a facility where African-Americans, overall, have received almost exactly the proportion of promotions that their numbers in the full-time workforce would suggest, and where the proportion of African-Americans in every EEO category, including managerial positions, ***exceeds*** the proportion in the relevant labor pool.

II. THE MODIFICATION OF THE INJUNCTION IN THIS CASE PRESENTS NO BASIS FOR FURTHER REVIEW

Petitioners suggest that because this is a civil rights case, there are no limits on the scope of injunctive relief. Indeed, in plaintiffs' view, "[t]he decertification of the class" — like the 93% failure rate of the individual plaintiffs, and the ability to prove discrimination against only two petitioners — "should have no effect on the scope of injunctive relief." Pet. 22. To the contrary, the Fourth Circuit correctly applied settled equitable principles to the unusual facts of this case in narrowing the decree to what could be justified in order to afford the prevailing plaintiffs complete relief.

A. The Fourth Circuit confronted a decree that, to remedy three isolated instances of discrimination — two of them denying the same promotion to the same person — ordered Circuit City to "revise its program of promoting employees" throughout its hundred departments and submit to having all promotions evaluated against a *de facto* quota; to create and staff a "Department of Diversity Management"; to comply with "labyrinthine provisions for reporting and enforcement"; to submit "[m]any aspects of the new programs * * * to Plaintiffs' approval"; and to pay "Plaintiffs' counsel * * * quarterly for fees and expenses incurred in the monitoring and enforcement of the order." Pet. App. 69a, 111a-115a. The Fourth Circuit's catalogue of these and other astounding aspects of the decree speaks for itself. See *id.* at 68a-70a.[9]

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[9] Petitioners prudently say nothing about the decree's effort to

Petitioners provide no sound reason for this Court to second-guess the Fourth Circuit's unremarkable conclusion that "such sweeping remedies far surpass those needed — and are far more burdensome than needed — to provide the prevailing Plaintiffs with complete relief." Pet. App. 69a. Indeed, there was ***no*** showing at trial that a lack of bureaucratic procedures at Circuit City actually ***caused any*** discrimination, or that the imposition of such procedures would reduce it. See p. 5, *supra*; C.A. App. 2816-2817. The Fourth Circuit's approach is completely in line with this Court's jurisprudence unequivocally limiting injunctive relief to the scope necessary to remedy "the injury-in-fact that" a private "plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). Certainly, as this Court held in *Lewis* — which ***was*** a class action — "two instances of actual injury" do not warrant system-wide injunctive relief, *id.* at 356, no matter how broadly the offending "practice" may be characterized.

The petition quotes (at 21-22) a misleading patchwork of broad statements about make-whole relief and suggests that the court of appeals' decision to narrow the unprecedented injunction in this extraordinarily weak case somehow conflicts with decisions of this Court. In a few class actions and cases brought by the government, this Court has upheld system-wide remedies altering specific, identified practices with specific discriminatory effects, such as the seniority system modified in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976), and that altered only in its application to provably harmed individuals in *Teamsters*, 431 U.S. at 356, 362, 371-372. Petitioners — who could never pinpoint an enjoinable practice that had a discriminatory effect — can identify no

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convert the entire corpus of federal civil rights legislation into the basis for contempt proceedings against Circuit City, the race-specific mentoring program, and the forbidding of ***any*** adverse action against ***any*** African-American employee. Pet. App. 69a-70a.

precedent that approaches the breadth and intrusiveness of the injunction narrowed by the Fourth Circuit here.

Not only was the relief in each of the cited cases more closely tailored to the violations at hand, but those cases bore no resemblance to this one. By contrast with petitioners' case, which relied on shaky statistics to support a theory that insufficiently regimented personnel practices permitted individual decisionmakers to discriminate in individual instances, the decisions of this Court on which petitioners rely involved years of "overt segregation," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 409 (1975), and "longstanding or egregious discrimination" including contemptuous resistance to prior anti-discrimination decrees. *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 448 (1986); see *United States* v. *Paradise*, 480 U.S. 149, 153 (1987). In the circumstances of this case, the Fourth Circuit appropriately limited the decree to an "award [of] make-whole relief to the individuals" who were provably "victimized." *Sheet Metal Workers*, 478 U.S. at 448.

B. Incredibly, petitioners repeat their claim (Pet. 23; see No. 98-972, Pet. 23 & Br. in Opp. 18-19) that the decision below conflicts with a dictum in *Meyer* v. *Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981). In *Meyer*, the Fifth Circuit reversed the ***entire*** injunction at issue (*id.* at 374), but stated that in some other, hypothetical cases "injunctive relief designed to assist a party will accidentally assist persons not before the court" (*ibid.*). Likewise, the Fourth Circuit explicitly acknowledged that, when a specific, identifiably discriminatory practice has injured an individual plaintiff, "individual relief equates to class-wide relief," Pet. App. 69a, and some of its prior decisions have taken that tack. *E.g.*, *Evans* v. *Harnett County Board of Education*, 684 F.2d 304, 306 (4th Cir. 1982) (relief awarded in individual action enjoined school district from hiring and assigning principals based on race). That was not the case here, where the injunction simply reproduced the predilections of petitioners' diversity consultant, who admitted that he had no evidence that his

favored procedures actually reduced discrimination. Even if conflicting dicta could support review, there is no conflict here.

C. Petitioners suggest that the Fourth Circuit was foreclosed from vacating the more extravagant portions of the district court's decree because the jury had found a free-standing "pattern or practice" of discrimination before rejecting 12 of the 15 alleged instances of actual discrimination that were before it. The Fourth Circuit held that, although "[e]vidence of a pattern or practice of discrimination" might be probative of individual claims (see Pet. App. 57a-58a), there is no such thing as a free-standing "pattern or practice" cause of action or judgment in an individual case. Accordingly, there is no basis for relief broader than that appropriate for the two prevailing individual plaintiffs.

As already noted, petitioners failed to show that discrimination in promotions occurred in 43 of the 46 instances that they hand-picked after a thorough 30-month investigation for inclusion in this suit — presumably the strongest cases found among Circuit City's workforce of 1,500 African-American employees. Thus, petitioners proved no "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters*, 431 U.S. at 336. Nothing remotely worthy of certiorari arises from the Fourth Circuit's fact-bound determination that the proof in this case did not justify the "sweeping" and "burdensome" remedies imposed by the district court. Pet. App. 69a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

RENEE LOWERY, *et al.*,

Petitioners,

v.

CIRCUIT CITY STORES, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Circuit City misstates both the nature of this case and the issues presented for review. The unanimous jury verdict finding Circuit City guilty of a pattern or practice of intentional race discrimination in promotions refutes the Company's tendentious argument that the case involved only isolated, individual claims of discrimination. The district court likewise found that the "totality" of Circuit City's excessively subjective promotion practices had a significant disparate impact on African Americans at headquarters. (C.A. App. 707)[1] The court of appeals rejected Circuit City's argument that the jury's pattern or practice finding was not based on substantial evidence. Indeed, in *Lowery II*, the court found that such evidence supported a finding, for purposes of punitive damages, that Circuit City had not made good faith efforts to comply with the antidiscrimination laws. (Pet. App. 21a-23a)

Nor is there any mystery about the nature of Circuit City's discrimination. Plaintiffs alleged and proved that Circuit City's all-white senior management, who openly expressed disdain for the abilities and qualifications of African Americans, implemented and maintained a system of excessively subjective procedures that prevented black employees from being promoted to management or supervisory positions at headquarters. This Court and others

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[1] Circuit City selectively quotes from the district court's disparate impact decision to suggest that plaintiffs had failed to demonstrate a pattern or practice of discrimination. Brief in Opposition ("Opp.") at 7. In fact, the court agreed with the jury that plaintiffs had demonstrated a "significant statistical disparity" in promotion rates of whites and blacks to management positions. (C.A. App. 706) The court concluded, however, that it could not "point to a specific portion of Circuit City's subjective promotion practices which causes a disparate impact on African Americans at Headquarters. It is the totality of the promotion practice which is problematic. That is why this case is most appropriately decided by the jury under the disparate treatment theory." (*Id.* at 707)

have frequently recognized that such excessively subjective personnel practices can serve as the basis for classwide liability under the antidiscrimination laws. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Green v. USX Corp.*, 843 F.2d 1511, 1533 (3d Cir. 1988); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983).

Circuit City's proven pattern or practice of discrimination confirms the propriety of the trial court's determination that this case satisfied the requirements of Rule 23(a) and 23(b)(2): the Company demonstrably "acted on grounds generally applicable to the class" of African American headquarters employees, "thereby making appropriate final injunctive relief" with respect to the class. Thus, the class certification question here is not, as Circuit City suggests, whether every case alleging a pattern or practice of discrimination is entitled to class treatment, or whether trial courts have discretion in making class certification decisions. Rather, the question presented, which transcends the facts of this case, is whether a class that the trial court has expressly and properly found to meet the requirements of Rule 23(a) and 23(b)(2) can nonetheless be decertified (or not certified at all) because of case management considerations applicable only to Rule 23(b)(3) classes. The Fourth Circuit's adoption of that approach violates this Court's admonition in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), against "judicial inventiveness" in the application of Rule 23 as written. Moreover, the court of appeals' clear error of law, if not corrected, will seriously hamper the ability of victims of systemic employment discrimination to enforce the expanded damage remedies under the Civil Rights Act of 1991. That important issue warrants this Court's plenary review.

The Fourth Circuit compounded its error, and the impact on private enforcement of the civil rights laws, by ruling that

the absence of a certified class precluded the district court from granting any relief to remedy the pattern or practice of discrimination found by the jury. Circuit City is wrong in claiming that the court of appeals merely modified an overbroad injunction that was unsupported by the particular facts. The Fourth Circuit vacated *all* aspects of the injunction relating to the pattern or practice of discrimination found by the jury, based on its holding that the district court could not grant "class-wide" injunctive relief. (Pet. App. 68a-69a) The court therefore refused to permit any remedy for Circuit City's proven pattern or practice of discrimination simply because the class was decertified for procedural reasons unrelated to the class-wide nature of the claims made or the relief requested. The court of appeals adhered to that position even after concluding in *Lowery II* that punitive damages were appropriate in view of Circuit City's failure to make good faith efforts to comply with the antidiscrimination laws. That result cannot be squared with this Court's long line of decisions that a district court has the broad power, and indeed the duty, to eradicate class-wide discriminatory practices that affect individuals other than the particular named plaintiffs. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 474 (1986). Review is necessary to ensure that district courts retain the power to remedy a proven pattern or practice of discrimination whether such discrimination is proved in an individual case or a class action.[2]

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[2] There is no basis for Circuit City's argument that this Court's grant of the prior petition in No. 98-972 is "tantamount to a denial of certiorari" on the two questions presented here. Opp. at 10 n.2. Because the prior petition also presented the same question regarding the standard for assessing punitive damages that this Court decided in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), and because the decision in *Lowery I* was so clearly contrary to the holding in *Kolstad*, it was not necessary for the Court to consider the other questions presented in No. 98-972 when it vacated *Lowery I* and remanded for further consideration in light of *Kolstad*. In *Lowery II*, the Fourth Circuit corrected its prior opinion on the issue of punitive damages but otherwise reaffirmed *Lowery I* in all

ARGUMENT

1. Circuit City attempts to avoid review of the class certification issues by portraying the Fourth Circuit's decision as a fact-based determination with no broad implications for enforcement of the civil rights laws. Opp. at 11-13. In fact, this case was based on an erroneous legal ruling that squarely presents a significant legal issue — whether the class action remains a viable procedural tool to remedy pervasive discrimination in the workplace. The district court exercised its discretion to certify the class, and the propriety of that ruling was confirmed by the pattern or practice verdict. But the district court then committed legal error by decertifying the class in a misguided attempt to deal with case management concerns. Circuit City suggests that the class was decertified here only because *this particular class* was unusually "cumbersome and inefficient." Opp. at 12.[3] The same management and efficiency issues, however, will arise in every case where employees exercise their right under the Civil Rights Act of 1991 to have a jury decide their individual claims for compensatory and punitive damages as well as their classwide claims for injunctive relief. In every such case, the same problems will arise as to the proper procedures for trying the common pattern or practice and injunctive issues as well as the individual damage claims. These issues are not unique to the present case.

Circuit City asserts that the Fifth Circuit's split decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.

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substantive respects. (Pet. App 5a) Accordingly, the questions relating to class certification and injunctive relief remain to be decided.

[3] Circuit City cites *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), for the proposition that cumbersome and inefficient class actions should not be certified. Opp. at 11, 16. *Reiter* actually addressed the power of the district courts to weed out frivolous antitrust class actions. 442 U.S. at 345, 346 (Rehnquist, J., concurring). It says nothing about the proper management of meritorious employment discrimination class actions with individual damage claims.

1998), and the Seventh Circuit's recent decisions in *Lemon v. International Union of Operating Engineers*, ___ F.3d ___, No. 99-4101, 2000 WL 733577 (7th Cir. June 9, 2000) and *Jefferson v. Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999) provide support for the Fourth Circuit's class action ruling in this case. Opp. at 14-15.[4] On the contrary, these decisions confirm both the importance of the question presented and the need for this Court's guidance. All of the cases reflect the lower courts' struggle to reconcile the expanded remedies authorized by the 1991 Civil Rights Act with the requirements of Rule 23.

In *Allison*, the panel majority held that the presence of individual damage claims in a case would preclude class certification under either Rule 23(b)(2) or 23(b)(3). 151 F.3d at 425. In denying a petition for rehearing, however, the court indicated that it had simply concluded that the trial court had not abused its discretion in denying class certification in the particular case. *Id.* at 434. If given broader application, the decision in *Allison*, like the decision below, would effectively thwart enforcement of the civil rights laws by precluding class actions whenever individual employees seek damages as well as class-wide injunctive relief.

In *Lemon* and *Jefferson*, the Seventh Circuit held that the presence of individual damage claims requires that class members receive notice and an opportunity to opt out of the class action, thereby precluding a "pure" Rule 23(b)(2) non-opt out class. *Lemon*, 2000 WL 733577, at *2-3; *Jefferson*, 195 F.3d at 897. Unlike the Fifth Circuit, however, the Seventh Circuit concluded that there were three potential

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[4] Circuit City also cites *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). That case, however, is substantially different in that it deals with discrimination in accommodations, rather than employment, and did not involve either a common pattern or practice of the sort found to exist here or the manageability concerns arising out of combining a class-wide injunctive action with individual class members' claims for compensatory and punitive damages.

options for certifying a class in such circumstances: (1) certification under Rule 23(b)(3) for both the class-wide and individual claims; (2) split certification, in which the claims for equitable relief would be certified under Rule 23(b)(2) and the damage claims would be certified under Rule 23(b)(3) and tried first; and (3) certification under Rule 23(b)(2) for all purposes, but with notice and opt out rights granted by the court pursuant to its authority under Rules 23(d)(2) and 23(d)(5). *Lemon*, 2000 WL 733577, at *3-4; *Jefferson*, 195 F.3d at 897-98.

The Seventh Circuit's decisions demonstrate that Rule 23, as written, gives the courts sufficient flexibility to certify pattern or practice class actions seeking both systemic injunctive relief and compensatory and punitive damages for individual class members. Neither the Seventh nor the Fifth Circuit, however, endorsed the approach adopted by the Fourth Circuit here, which was to conflate the separate requirements of Rule 23(b)(2) and 23(b)(3) in order to deny certification of an otherwise proper class. Despite the court's disclaimer, it is quite clear from footnote 5 of the court's opinion in *Lowery I* (Pet. App. 52a) that the district courts in the Fourth Circuit are now authorized to consider manageability and superiority in certifying and decertifying a 23(b)(2) class action. That result clearly is contrary to *Amchem*, which requires the courts to apply Rule 23 as written. Moreover, the court of appeals itself acknowledged that it was weighing in on one side of a split in the circuits, citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), as a conflicting authority. (Pet. App. 51a) The court even quoted the portion of the *Forbush* opinion in which the Fifth Circuit held that "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions." (*Id.*) This, of course, is just the opposite of the Fourth Circuit's holding in the present case.[5]

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[5] Circuit City argues that the Fifth Circuit resolved the *Forbush* conflict in its later *Allison* opinion. Opp. at 17 n.5. In fact, the Fifth

Thus, review by this Court is necessary to resolve the discord among the circuits, confirm the principles of *Amchem* with respect to Rule 23(b)(2) and clarify the confusion that has arisen about the proper manner of certifying class actions under the 1991 Civil Rights Act. This case is an unusually good candidate for such a review because it presents the class certification issues so clearly and concretely. The issues are presented *clearly* because the district court held that the class action met all of the requirements of Rule 23 and was decertified *only* because the court could not devise what it considered a fair and efficient means of trying the class members' individual claims for compensatory and punitive damages. (Pet. App. 94a) The case therefore squarely raises the issue of how to deal with individual damage claims in an otherwise proper pattern or practice class action. The issues are presented *concretely* because, despite the decertification order, the case was tried in essence as a liability-stage class action and resulted in specific jury determinations that Circuit City did engage in a pattern or practice of intentional discrimination and that certain of the petitioners were entitled to recover compensatory and punitive damages. Therefore, unlike the decisions in *Allison*, *Lemon* and *Jefferson*, which arose on interlocutory appeals from initial class certification decisions, this case provides a robust factual and legal framework in which to decide how pattern or practice class actions may be tried when they involve individual damage claims in addition to systemic injunctive relief.

2. Circuit City argues that the injunction entered by the district court was not necessary to remedy "three isolated instances of discrimination." Opp. at 20. The argument misses the point because the injunction was intended to remedy the pervasive pattern or practice of intentional discrimination that had been found to exist throughout Circuit

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Circuit in *Allison* actually adhered to and reinforced *Forbush*. *See* 151 F.3d at 414 n.8. In any event, the decision below is also in conflict with several other circuit court decisions, which are listed in Circuit City's brief. Opp. at 17 n.6. The split in the circuits on this issue is undeniable.

City's headquarters. The Fourth Circuit's conclusion that, as a matter of law, the decertification of the class for management reasons precluded entry of injunctive relief to eliminate proven systemic discrimination is neither legally nor logically supportable, and exacerbates the harm caused by its ruling on class certification.

Contrary to Circuit City's argument (Opp. at 21-22), there is ample legal authority supporting the district court's injunctive decree. In similar circumstances, other courts have entered comparable systemic injunctions. Indeed, the injunction here was based in large part on those portions of the decree affirmed by the Fourth Circuit in *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 643-52 (4th Cir. 1978). *See also Sheet Metal Workers*, 478 U.S. at 481-82 (court-appointed administrator with broad powers to supervise union's compliance); *Thomas v. Washington County School Bd.*, 915 F.2d 922, 926 (4th Cir. 1990) (publicly advertised selection process); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 146-47 (4th Cir. 1984) (posting notices of job opportunities, survey of black employees' job interests, detailed job descriptions, periodic reports of compliance), *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 498-99 (4th Cir. 1981) (development of objective promotion criteria and creation of new EEO Employee Complaints Representative position). *See generally* 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1744-68 (3d ed. 1996). In short, the injunction entered in this case is not an aberration, but rather is typical of injunctions generally used to eliminate systemic discrimination. What is aberrational is the court of appeals' refusal to allow the district court to remedy such systemic discrimination.[6]

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[6] It is clear that the Fourth Circuit rendered the district court powerless to impose any remedy for Circuit City's discriminatory promotion practices. If the court of appeals had simply been concerned with the overbreadth of certain of the provisions of the injunction, as Circuit City contends (Opp. at 20), it would have remanded the matter to

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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the district court to enter an injunction more narrowly tailored to remedy the pattern or practice found by the jury. Instead, the court vacated, without remand, the entire injunction other than the provisions relating to Lowery, based on its conclusion that the district court could not impose *any* "class-wide" injunctive relief in the absence of a certified class action. (Pet. App. 68a)